Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, AFL-CIO, an unincorporated association, and IRON WORKERS LOCAL UNION No. 378, an unincorporated association,

Petitioners,

v.

CAMPING CONSTRUCTION COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT HAS IMPROPERLY CREATED AN EXCEPTION TO THIS COURT'S HOLDING THAT STATUTORY RIGHTS AND OBLIGATIONS ARE "PRESUMED" ARBITRABLE" BY REQUIRING THAT CLAIMS OF REPUDIATION OF COLLECTIVE BARGAINING AGREEMENTS UNDER SECTION 8(f) OF THE NATIONAL LABOR RELATIONS ACT ARE TO BE RESOLVED BY THE COURT RATHER THAN BY THE ARBITRAL FORUM AS PROVIDED IN THE COLLECTIVE BARGAINING AGREEMENT?

2. WHETHER THE CONFLICT AMONG THE CIRCUITS REGARDING THE RETROACTIVE APPLICATION OF *DEKLEWA*, WHICH NEGATIVELY IMPACTS UPON THE UNIFORM ADMINISTRATION OF FEDERAL STATUTORY LABOR LAW AND ADVERSELY AFFECTS CONSTRUCTION INDUSTRY INDUSTRIAL RELATIONS, REQUIRES FINAL RESOLUTION BY THIS COURT?

LIST OF PARTIES

The parties to the proceedings below, and before this Court are:

1. District Council of Iron Workers of the State of California and Vicinity;
2. Iron Workers Local Union No. 378;
3. Camping Construction Co.

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PETITION FOR WRIT OF CERTIORARI

The District Council of Iron Workers of the State of California and Vicinity and Iron Workers Local Union No. 378 (hereinafter referred to as the "Unions") respectfully pray that a Writ of Certiorari issue to review a portion of the Order and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 2, 1990. A Petition for Rehearing was denied, and a Suggestion For Rehearing *En Banc* was rejected by the Ninth Circuit on November 11, 1990.

OPINIONS BELOW

The Order and Opinion of the United States Court of Appeals for the Ninth Circuit (App. A, p.1a, *infra*) filed October 2, 1990, is reported at 915 F. 2d 1333. The Order of the United States District Court for the Northeastern District of California denying the Motion for Reconsideration and granting a Stay pending appeal, filed July 18, 1988, is unreported, and reprinted in App. B p.38a, *infra*. The Order of the United States District Court for the Northern District of California regarding Motions for Summary Judgment, filed April 22, 1988, is unreported and reprinted in App. C, p.42a, *infra*. The Preliminary Injunction of the United States District Court for the Northern District of California staying arbitration filed September 24, 1987 is unreported and reprinted in App. D, p.47a, *infra*. The Findings of Fact and Conclusions of Law of the United States District Court of the Northern District of California, filed October 6, 1987 are unreported and reprinted in App. E, p.49a, *infra*. The Judgment of the United States District Court for the Northern District of California granting the Unions' Motion for Summary Judgment, filed April 22, 1988 is unreported and reprinted in App. F, p. 55a, *infra*. The Order of the United States Court of Appeals for the Ninth Circuit, denying the Unions' Petition for Rehearing, and rejecting the Suggestion for Rehearing *En Banc*, filed December 11, 1990, is unreported and reprinted in App. G, p.56a, *infra*.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on October 2, 1990. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on October 11, 1990. On December 11, 1990, the Petition for Rehearing was denied, and the Suggestion for Rehearing *En Banc* was rejected. The jurisdiction of this Court is invoked

under 28 U.S.C. § 1254(a). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c) and U.S. Sup. Ct. Rule 13.4.

STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, Section 8(f), 29 U.S.C. § 158(f).

B. Labor-Management Relations Act of 1947, as amended, Section 301, 20 U.S.C. § 185.

Pertinent portions of these statutory provisions are reproduced at Appendix H, p. 58a, *infra*.

STATEMENT OF THE CASE

The District Council of Iron Workers of the State of California and Vicinity, and the Iron Workers Local Union No. 378, are labor organizations within the meaning of the National Labor Relations Act of 1947, as amended (hereinafter "NLRA"), 29 U.S.C. § 152(5). They exist in whole or in part for the purpose of negotiating and entering into collective bargaining agreements on behalf of themselves and their constituent members.

Camping Construction Company is an employer primarily engaged in the construction industry within the meaning of § 8(f) of the NLRA, 29 U.S.C. § 158(f).

The jurisdiction of the district court was invoked pursuant to § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185 to resolve a labor dispute which existed between Camping and the Unions. Camping filed a Complaint for an Injunction to stay a scheduled arbitration proceeding, and for declaratory relief against the Unions.

On October 1, 1978, Camping and the District Council of Iron Workers entered into a collective bargaining agreement, known as the Iron Workers' Independent Agreement. By entering this agreement, Camping agreed to comply with the terms and conditions of the District Council's 1977-80 Master Agreement, and "to comply with . . . any modifications, changes, extensions or renewals of or to said Master Agreement which may be negotiated by the parties thereto." Camping employed union labor in compliance with the Agreements for a short time, however, it subsequently discontinued this practice. *Camping Construction Co. v. District Council of Iron Workers*, 915 F. 2d 1333, 1335 (9th Cir., 1990). The Agreement contained a termination mechanism which provided for the automatic renewal and continuation of the collective bargaining agreement in the absence of notice by either party within a specified "window period."

On February 21, 1980, the District Council informed Camping, by mail, of its desire to open the collective bargaining agreement to negotiate changes, modifications, extensions and renewals. The contractor did not respond to the District Council's notice and neither participated in subsequent bargaining nor executed any further agreements. However, Camping took no formal action to terminate the Agreement or to prevent its automatic renewal. *Id.*

Since at least June, 1980, Camping has sub-contracted out all iron workers' work to non-union companies at its projects throughout Northern California. Camping asserts that since that time it has not used the union hiring hall, submitted fringe benefit contributions, or operated in any manner under the terms of the Agreements. The Unions, however, sent Camping numerous notes of changes, amendments and modifications during the period of July, 1980 to July, 1987 based on their belief that Camping was still bound by the Master Agreement.

Camping did not reply nor did it take action to disavow its signatory status. *Id.*

In February and June, 1987, Local 378 filed two grievances against Camping, pursuant to the grievance procedures of the Master Agreement then in force. Section 28 of the Master Agreement provides for the settlement of *all grivances*, other than jurisdictional disputes by Boards of Adjustment which "shall have the power to adjust *any differences* that may arise regarding the meaning and enforcement of this Agreement." (emphasis added). The Unions claim that Camping's use of non-union labor violated two sections of the Master Agreement regarding subcontractors and the use of the Union hiring hall. In response to these grievances, Camping filed a Complaint for an Injunction staying the scheduled arbitration and for a declaration that the contractor was no longer obligated to comply with the terms and conditions of the Master Agreement. Camping argued that its obligations under the Master Agreement had ceased by: (1) the District Council's letter of February 1, 1980 which Camping claimed constituted a termination notice; and (2) Camping's subsequent conduct which had served to repudiate the earlier agreement. The district court granted the Preliminary Injunction staying the arbitration, pending conclusion of the declaratory judgment action. The Unions appealed the grant of the Preliminary Injunction.

Subsequently, the district court granted summary judgment for the Unions, holding that both the termination and repudiation by conduct were arbitrable issues, reviewable by the court only upon a motion to confirm or vacate the arbitration award. *Id.* The district court denied Camping's Motion for Reconsideration. However, the court granted Camping's motion staying the arbitration pending appeal by Camping.

On appeal, the Ninth Circuit affirmed in part and reversed in part the district court decision. The court held

that while the issue of termination of the collective bargaining agreement was to be determined by the arbitrator under the broad arbitration clause, the question of Camping's repudiation of the Agreement was not an arbitrable issue. *Id.* at 1340. The court acknowledged that issues of termination and repudiation of collective bargaining agreements containing broad arbitration provisions, such as the instant case, are both arbitrable. *Id.* at 1338. However, the court concluded that since the right to repudiate a pre-hire contract was a right created by federal statute rather than by contract, the question of effective repudiation was one for the court. *Id.* This decision is directly contrary to this Court's holdings in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[1] and *Shearson/American Express, Inc. v. McMahon*[2].

The Ninth Circuit explained that its decision denying the arbitrability of the repudiation of pre-hire contracts must be based on "pre-*Deklewa* law." *Id.* at 1337 n. 2. In *John Deklewa*, 282 NLRB 1375 (1987), *enforced sub. nom. International Association of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir., 1988), *cert. den.*, 488 U.S. 889 (1988), the National Labor Relations Board (hereinafter "NLRB") held that employers may not unilaterally repudiate pre-hire collective bargaining agreements authorized by § 8(f) of the NLRA during their term absent a Board-conducted election in which the majority of employees vote to decertify their union. Further, the Board held that this rule would be applied retroactively to all cases. *Deklewa*, 282 NLRB at 1389. The Ninth Circuit has adopted the *Deklewa* decision abolishing the unilateral repudiation of pre-hire agreements, as have all other circuits which have considered the question. *Mesa Verde*

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[1] 473 U.S. 614 (1985).

[2] 482 U.S. 220 (1987).

Construction Co. v. Northern California District Council of Laborers, 861 F.2d 1124 (9th Cir., 1988), *en banc*, (*Mesa Verde II*). However, the Ninth Circuit has refused to apply this principle retroactively. *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 885 F.2d 594 (9th Cir. 1990), *cert. den.*, —— U.S. ——, 59 U.S.L.W. 3250 (1990) (*Mesa Verde III*). This decision resulted in a conflict in the circuits. The Ninth Circuit concedes that it retains the minority position in this conflict. *Camping*, at 1337-38 n.2.

The court determined that "pre-*Deklewa*" law must be applied to determine whether Camping successfully repudiated its pre-hire agreement. *Id.* Based on this rationale, the Court relied on prior Ninth Circuit decisions for the proposition that issues of repudiation of § 8(f) prehire collective bargaining agreements were to be determined by the court and not the arbitrator. *Id.* In conclusion, the Ninth Circuit held that the district court's order enjoining the pending arbitration proceedings was prohibited by the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115.

REASONS FOR GRANTING THE WRIT

The decision below results in a direct conflict with applicable Supreme Court precedents. Specifically, without explanation, the Ninth Circuit has created an exception to this Court's rule that statutory rights are presumed arbitrable.[3] The Ninth Circuit decision impacts negatively on the administration of federal statutory labor law, causing confusion in an area already in substantial flux. The combination of the Ninth Circuit's decision in the instant case, and its decision refusing to

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[3] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

apply *Deklewa*[4] retroactively,[5] causes ongoing instability in collective bargaining relationships throughout the construction industry. Both the decision below (in conflict with this Court's decisions) and the *necessarily related* prior decision rejecting retroactive application of *Deklewa* (the minority position in the current conflict among the circuits) are antithetical to federal labor policies which favor arbitration as the preferred method of resolving labor disputes. *Instead*, these decisions foster labor instability in the construction industry. In *Mesa Verde III* this Court did not take the opportunity to resolve this ongoing conflict although Justice White would have granted certiorari. Because there are literally thousands of collective bargaining agreements which may be affected by these decisions, the Unions respectfully submit that these circumstances warrant a final decision by the Supreme Court, the only tribunal capable of resolving these issues.

I. THE NINTH CIRCUIT'S HOLDING EXEMPTING CLAIMS OF REPUDIATION OF SECTION 8(f) AGREEMENTS FROM THE ARBITRATION MECHANISM CONFLICTS WITH APPLICABLE SUPREME COURT DECISIONS.

The court below held, applying "pre-*Deklewa*" law,[6] that issues regarding the repudiation of section 8(f)[7] pre-hire collective bargaining agreements were for the court rather than the arbitrator, since the right to repudiate was based upon federal statute. *Camping*

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[4] *John Deklewa*, 282 N.L.R.B. 1375, *enforced sub nom. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. den.*, 488 U.S. 889 (1988).

[5] *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 885 F.2d 594 (9th Cir. 1990), *cert. den.*, —— U.S. ——, 59 U.S.L.W. 3250 (1990), (*Mesa Verde III*).

[6] See *supra*, text following note 2.

[7] 29 U.S.C. § 158(f) (hereinafter referred to as § 8(f)).

Constr. Co. v. District Council, 915 F.2d 1333, 1338 (9th Cir. 1990). This decision directly conflicts with Supreme Court precedents which were raised by petitioner in the court below. Without explanation, the Ninth Circuit completely disregarded principles announced by this Court. Therefore, Petitioners respectfully call upon this Court to exercise its powers of supervision over the lower federal courts in order to ensure the uniform application of federal statutory law in this important area.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court held that under the Federal Arbitration Act, parties to an agreement containing a broad arbitration clause were obligated to submit their disputes to arbitration even though these claims arose under *federal antitrust statutes.* This Court emphasized the strong federal policy favoring arbitration, and explained that while the parties' intentions generally controlled, doubts regarding the scope of arbitrability are resolved in favor of arbitration. *Id.* at 626.

This Court declared "[t]*here is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights.*" *Id.* (emphasis added). The Court explained that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 628. For these reasons the Court rejected the Respondent's contention that a presumption against the arbitration of statutory rights must be implied in the agreement at issue. *Id.* at 625.

The Court set out the following test to be applied regarding the question of arbitrability of claims arising under federal statutes:

> We must assume that if Congress intended the statute to include protection against waiver of the

> right to a judicial forum, that intention will be deducible from the text or legislative history [citation]. [H]aving made the bargain to arbitrate, the parties should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id. at 628.

Any doubt regarding whether these principles announced in *Mitsubishi*, were applicable to arbitration agreements involving other than international transactions was removed by *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). In *Shearson/American Express*, this Court extended *Mitsubishi*, holding that claims arising under section 10(b) of the Securities and Exchange Act as well as claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) are arbitrable, even though they are based on federal statute. This Court established a presumption of arbitrability in such cases stating "[T]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 227.

By its decision, the Ninth Circuit has created an exception to this Court's precedents, and done so without advancing any explanation. Petitioners submit that the *Mitsubishi* principle, as extended by *Shearson/American Express*, which put to rest the discredited notion that the assertion of claims based on *statutory* rights are not arbitrable, is controlling in the collective bargaining context of the instant case. The strong federal policy favoring arbitration, relied on in *Mitsubishi* and *Shearson/American Express*, is fully consistent with this Court's approach to the arbitrability of labor disputes established in the *Steelworkers' Trilogy* cases in 1960.[8]

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[8] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960)

Two basic principles are clear from the *Steelworkers' Trilogy*. First, arbitration of labor disputes is a crucial factor in fostering the federal policy of labor relations stability. *Warrior & Gulf*, at 585. "The present federal policy is to promote industrial stabilization through the collective bargaining agreement. [citation]. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *Id.*

Second, based on the unique role of arbitration in labor relations, in construing the scope of a collective bargaining agreement's arbitration clause, there is a strong presumption favoring the arbitrability of disputes between the parties. *Warrior & Gulf*, at 582-83.

This presumption has particular force where the arbitration clause, as in the present case, covers all disputes, without exception, concerning the interpretation or application of the collective bargaining agreement: In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *AT & T Technologies v. Communications Workers*, 475 U.S. 643, 650 (1986) (quoting *Warrior & Gulf*, 363 U.S. at 584-85).

Since *Mitsubishi* and the Steelworkers' Triology are based on the same underlying premise favoring arbitration, the Ninth Circuit should have explained why an exception should be created in this case. Nothing in the text or history of § 8(f) indicates a Congressional intent to preclude a waiver of judicial remedies. Indeed the "right" to repudiate a § 8(f) agreement appears nowhere in the text of § 8(f). Moreover, every court which has considered the National Labor Relations Board's discussion of the legislative history of § 8(f) in *Deklewa*

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and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

agrees that Congress never intended to create such a "right" to repudiate.[9] Thus, the decision below is in conflict with *Mitsubishi* and *Shearson/American Express* and interferes with these important federal labor objectives. The Supreme Court has granted certiorari in cases when the appellate court's ruling appears in conflict with Supreme Court precedents. *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733-34 (1982).

II. THE RATIONALE OF THE DECISION BELOW IS UNSOUND AND RESTS ON DISCREDITED PREMISES.

In addition to its conflict with Supreme Court rulings, the rationale of the decision below rests on discredited principles. The Ninth Circuit approached this case by applying "pre-*Deklewa*" law whereby a party could extinguish its obligations under a § 8(f) collective bargaining agreement by unilaterally repudiating the agreement. *Camping*, 915 F.2d at 1337, n.2. In *John Deklewa*, 282 N.L.R.B. 1375 (1987), *enforced sub nom. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. den.*, 488 U.S. 889 (1988), the NLRB, reversing prior precedent, established the clear rule that an employer may not terminate or repudiate its § 8(f) collective bargaining agreements absent a timely notice of termination or through a NLRB conducted election in which a majority of employees vote to decertify their Union.

In *Deklewa*, the NLRB, after exhaustive review of the legislative history of section 8(f), abolished the "repudiation doctrine." The NLRB held that employers would no longer be free to repudiate § 8(f) agreements. *Deklewa*, at 1384. The NLRB further held that this rule would be applied retroactively to all cases. *Id.* at 1389. Although the Ninth Circuit has adopted *Deklewa* as the

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[9] *See* cases cited *infra* notes 14-15.

law of the circuit,[10] retroactive application in the circuit has been rejected.[11]

Thus, "pre-*Deklewa*" law recognizing unilateral repudiation of § 8(f) agreements was applied by the court below.[12] Although the issues in the instant matter involving the arbitrability of repudiation claims of pre-hire agreements are of independent significance in the construction industry, absent the Ninth Circuit decision rejecting retroactive application of *Deklewa*,[13] the present case could not arise.

Four points undermine the decision below. First, even though the court concluded that it was bound to apply "pre-*Deklewa*" law, it failed to apply *Mitsubishi*. The gravamen of its decision rejecting the arbitrability of repudiation claims was that the right to repudiate a pre-hire contract arose not by the contract but by federal statute. *Camping*, at 1338. *Mitsubishi*, decided by the Supreme Court, is directly applicable, and Petitioners submit, should be viewed as controlling on this issue. Furthermore, *Mitsubishi*, fits the Ninth Circuit's criterion as "pre-*Deklewa*" law since it was decided in 1985 and is not inconsistent with *Mesa Verde III*. The Ninth Circuit never addressed *Mitsubishi*.

Second, the very existence of this case demonstrates that various disputes involving the repudiation of § 8(f) pre-hire contracts will continue to arise despite *Deklewa*, in those circuits where retroactive application was re-

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[10] *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988), *en banc* (*Mesa Verde II*).

[11] *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 885 F.2d 594 (9th Cir. 1990), *cert. den.*, —— U.S. ——, 59 U.S.L.W. 3250 (1990) (*Mesa Verde III*).

[12] In the Ninth Circuit, *Deklewa* is not applied in cases where repudiation is claimed prior to February 20, 1987, the date *Deklewa* was decided. *Camping* at 1337, n.2.

[13] *Mesa Verde III*.

jected. Currently, the Seventh, Eighth, and Third Circuits, as well as the NLRB, apply *Deklewa* retroactively.[14] In the minority, the Ninth and Fifth Circuits do not.[15] *Camping*, at 1337-38, n.2. The Ninth Circuit acknowledged the disorder in § 8(f) law resulting from its decision refusing retroactive application.[16] However, the court mistakenly assumes that this confusion will soon be eliminated. Due to unique aspects of construction industry agreements, employers who assent to the extension of their agreements without actually signing the extended agreement (which represents the vast majority of construction industry collective bargaining agreements), will continue to have the capability of claiming unilateral repudiation of their agreements under "pre-*Deklewa*" law.[17]

Camping's conduct in the present case is illustrative of this dilemma. Camping initially argued that its obligations under the agreement were timely terminated. *Camping* at 1337, n.2. The Ninth Circuit acknowledges that questions of termination are arbitrable. *Id.*, at 1340. It was only later in the proceedings when Camping, almost as an afterthought, added the convenient but significant defense of repudiation. *Id.* at 1337, n.2. It is the claimed repudiation which, under "pre-*Deklewa*" law, provides the excuse to gain access to the courts and to evade its obligation to arbitrate. By barring retroactive application of *Deklewa*, repudiation issues will continue to cause disorder and confusion in § 8(f) law, and will interfere with construction industry relations as well as provide additional litigation for already over-

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[14] See, *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990); *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir. 1989); and *International Association of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

[15] See, *United Bhd. of Carpenters and Joiners, Local Union 953 v. Mar-Len of Louisiana, Inc.*, 906 F.2d 200 (5th Cir. 1990); and *Mesa Verde III*.

[16] *Camping*, at 1339.

[17] See *infra* p. 17.

burdened courts. It is for these reasons that Petitioners respectfully request that this Court take the opportunity to consider the retroactive application of *Deklewa*. (See discussion, *infra*). The lower court's failure to apply the *Mitsubishi* principles in the collective bargaining context, combined with its refusal to apply *Deklewa* retroactively, causes continuing destabilizing repercussions in construction industry labor relations which will continue far into the future.

Third, the court below reaffirmed the "*Ion* exception" to the general rule that issues involving both the termination and repudiation of collective bargaining agreements containing a typical broad arbitration clause, must be submitted to arbitration, in accordance with the intent of the parties. *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distributor Co.*, 832 F.2d 507 (9th Cir. 1987). *Ion Constr. Co. v. District Council of Painters No. 16*, 803 F.2d 1050 (9th Cir. 1986) carved out a narrow exception to this rule, holding that in cases of § 8(f) pre-hire agreements, an employer's claim that it has repudiated the contract is not arbitrable. *Id.* at 1051. This exception was based on the contention that claims arising under statutory rights are not arbitrable,[18] and the notion that since unilateral repudiation of § 8(f) agreements was permitted pre-*Deklewa*, once the employer effectively repudiated its contract, the employer no longer had an obligation to arbitrate.[19]

The lower court's reaffirmation of the so-called "*Ion* exception" is mistaken. First, *Mitsubishi* was decided prior to *Ion* and should have controlled that decision. However, *Mitsubishi* was not considered by the *Ion* court. Second, *Deklewa* as well as the *en banc* decision in *Mesa Verde II*, completely discredit any contention that § 8(f)

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[18] *See, Interstate Distributor*, 832 F.2d at 511, n.4.

[19] *Ion Constr. v. Dist. Council*, 593 F. Supp. 233 (N.D. Cal. 1984).

created any statutory right to repudiate pre-hire collective bargaining agreements:

> First, the current law [permitting unilateral repudiation] does not fully square with either Section 8(f)'s legislative history or that section's actual wording. . . . Because such a right of unilateral repudiation is so antithetical to traditional principles of collective-bargaining under the Act, it seems likely that Congress would have expressly stated such a right if it intended to create one.

Deklewa, at 1379, 1381.

We find that the legislative history of 8(f) better supports *Deklewa's* non-repudiation rule rather than the *R.J. Smith* approach. *Mesa Verde II*, at 1131.

Finally, the court's decision that statutory rights are not arbitrable completely disregards the ability of parties to waive statutory rights in the process of collective bargaining. There is no reason why the parties to a collective bargaining agreement can not provide for an exclusive mechanism by which either party may terminate their relationship, as well as a framework for dispute resolution. In *Mitsubishi*, this Court recognized the ability of contracting parties to exclude statutory claims from the scope of their agreement to arbitrate. *Mitsubishi* at 628. Furthermore, such provisions contained in a collective bargaining agreement will be enforced even though they involve a waiver of a party's statutory rights. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705-08 (1983). The arbitration clause at issue provides for the settlement of all differences which may arise "regarding the meaning and enforcement" of the agreement by arbitration. *Camping*, at 1335. However, the parties specifically excluded jurisdictional disputes from resolution by arbitration. This demonstrates that the parties utilized their ability to exclude issues from the ambit of arbitration, indicating an intent to arbitrate issues not excluded. Therefore, under *Metropolitan Edison*, the Ninth Circuit should have concluded that the repudiation issues between the parties were arbitrable.

In summary, the lower court's decision not only conflicts with Supreme Court decisions, but has failed to recognize that the basic premises on which it relies have been abandoned by the NLRB and the majority of circuits which have considered these questions. This Court's decisions in *Mitsubishi* and *Shearson/American Express* should have been addressed below even within the limitations of the Ninth Circuit's "pre-*Deklewa*" analysis. Furthermore, the court below seriously underestimates the continuing impact of its decisions. Parties to construction industry collective bargaining agreements will continue to be unable to rely on the dispute resolution mechanisms they have agreed upon. This uncertainty and confusion will surely generate further burdensome litigation.

III. THE CONFLICT AMONG THE CIRCUITS REGARDING THE RETROACTIVE APPLICATION OF *DEKLEWA* CAUSES UNCERTAINTY WITH RESPECT TO THE ADMINISTRATION OF SECTION 8(f) STATUTORY LAW, CONFUSION IN CONSTRUCTION INDUSTRY LABOR RELATIONS, AND REQUIRES FINAL RESOLUTION BY THIS COURT.

But for the Ninth Circuit's decision in *Mesa Verde III* refusing to apply *Deklewa* retroactively, this case would not be before this Court. Were it not for that decision, Camping would have no legal basis to claim that it had effectively repudiated the collective bargaining agreement. Though this issue was not expressly raised below, the court acknowledged the complexity and confusion under § 8(f) law as a consequence of its decision in *Mesa Verde III*, and the fact that it is in the minority in the current conflict among the circuits. *Camping*, at 1337-40. Moreover, this Court has the discretion to decide questions not raised below where the issue involves those decided below. *Youakim v. Miller*, 425 U.S. 231, 234-35 (1976); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (the Court may decide purely legal questions presented in petition though not raised below).

In its decision, the lower court characterized the consequences of its application of "pre-*Deklewa*" law as *soon to be of only historical interest*, and ". . . . will shortly die a well-deserved natural death." *Camping*, at 1339. These characterizations presuppose that all the cases to which "pre-*Deklewa*" law applies will soon be put to rest. The foregoing statements by the lower court demonstrate a crucial misunderstanding of construction industry collective bargaining practices. Furthermore, in its opinion, the court conceded its minority status in the conflict between the federal courts of appeal on this issue and seems, in its tone, to seek the guidance of this Court. *Id.* at 1337, n.2.

The Ninth Circuit's determination that issues of repudiation of § 8(f) agreements will soon disappear as a result of *Deklewa* is purely speculative at best. At worst, if *Mitsubishi* is not applied in the context of collective bargaining agreements, and *Deklewa* is not applied retroactively, the consequences of "pre-*Deklewa* law" will be thriving in the areas covered by the Ninth Circuit for many years to come. As in the present case, virtually all construction industry collective bargaining agreements contain an "evergreen" or "automatic rollover" clause whereby the agreement is automatically extended unless a party terminates its obligations in accordance with the governing termination provisions. As a result of this automatic renewal or extension of the agreement, most construction industry employers do *not* execute the extended agreement, but are bound by the agreement in accordance with the terms of the "evergreen" clause. For any agreement entered into prior to *Deklewa*, and which was not subsequently re-executed after *Deklewa* was decided, the employer remains able to claim that it repudiated the agreement at some time prior to *Deklewa* and *Mesa Verde III*. Thus, under *Camping*, a dispute involving acts of repudiation by the employer prior to February 20, 1987 opens the doors of the federal courts, and displaces arbitration as the favored dispute resolu-

tion mechanism (as well as the mechanism agreed to by the parties).

The question of the retroactivity of *Dekleva* has been raised before this Court before and certiorari was denied. *Mesa Verde III*. Justice White would have granted certiorari based on the conflict among the circuits. As can be seen, the consequences of not applying *Dekleva* retroactively cause unnecessary complexity and confusion in the area of § 8(f) law, and ongoing litigation. Petitioners submit that a conclusion to this dilemma, absent a decision by this Court, is impossible to predict. The existence of *Camping* is but one example, and numerous disputes regarding repudiations allegedly effected prior to *Dekleva* have already arisen, and are likely to recur.

In addition to the existence of a conflict between the circuits on the question of retroactivity,[20] the existence of a conflict between the minority circuits and the NLRB must be noted. The minority refuse to defer to the judgment of the Board concerning retroactivity, despite accepting the exhaustive review and analysis of the Board in *Dekleva* on the substantive issue rejecting the notion of a "right" to repudiate". This Court has granted certiorari to review the judgment of an appellate court which contravened the interpretation of a regulatory statute by an administrative agency. *Federal Power Comm'n. v. Texaco, Inc.*, 417 U.S. 380, 383 (1974). The Supreme Court consistently defers to the reasonable interpretations of the NLRB. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 496 (1985).

Finally, the inconsistent decisions resulting from the conflict in the circuits on the question of retroactivity promotes forum shopping. In cases of regional or national collective bargaining agreements, the parties are free to bring their claims in the circuit most sympathetic to their objectives. Thus, a collective bargaining agreement, which by its terms applies nationally, can be found to be binding

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[20] *See, supra*, notes 14-15 and accompanying text.

in Philadelphia under the majority position; while the *same* agreement between the *same* parties can be held to be null and void in San Francisco under the minority view. This climate conflicts with the uniform application of national labor law and threatens the national policy of labor stability, since the parties to the agreement, as well as the employees, can never be certain as to the extent of their rights and obligations under the agreement.

Deklewa was an important, well-reasoned decision which provided clarification of construction industry collective bargaining rights and obligations under § 8(f). However, the minority circuits' refusal to apply *Deklewa* retroactively leaves this area in continuing disarray. As is evident by the conflict in the circuits, the lower federal courts cannot resolve this problem. Therefore, petitioners appeal to this Court, as the final arbiter of federal law, to decide these questions and provide the guidance necessary for consistent application of the federal statutory scheme under § 8(f).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should issue to resolve these significant matters.

Respectfully submitted,

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Dated: March 8, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 87-2767, 88-15169

CAMPING CONSTRUCTION COMPANY,
Plaintiff-Appellee,

v.

DISTRICT COUNCIL OF IRON WORKERS; IRON WORKERS LOCAL UNION 378,
Defendants-Appellants.

CAMPING CONSTRUCTION COMPANY,
Plaintiff-Appellee-Cross-Appellant,

v.

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, an unincorporated association, and IRON WORKERS LOCAL UNION NO. 378, an unincorporated association,
Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted Aug. 16, 1989
Decided Oct. 2, 1990

Mark R. Thierman and Robert Fried, Thierman, Cook, Brown & Prager, San Francisco, Cal., for plaintiff-appellee-cross-appellant.

Victor J. Van Bourg and Sandra Rae Benson, Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, Cal., for defendants-appellants-cross-appellees.

Before GOODWIN, Chief Judge, and PREGERSON and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

These consolidated appeals require us to address once again—for the last time, in all likelihood—the arbitrability of a labor dispute under a "prehire" collective-bargaining agreement when one of the parties claims to have repudiated that agreement. We must also decide the extent to which the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101-115, constrains a district court's power to stay a labor arbitration while the issue of arbitrability is properly before that court. The court below granted the employer's request for a preliminary injunction staying the arbitration sought by the unions, in spite of the unions' claim that such an injunction was prohibited by the Norris-LaGuardia Act. However, the court later granted summary judgment for the unions on the ground that, under the broad arbitration clause at issue, questions relating to termination and repudiation of the agreement were to be decided by an arbitrator rather than the court; it then stayed the arbitration pending our decision. We conclude that the district court's order granting the preliminary injunction was in error, and that the order granting summary judgment for the unions was only partially correct. We therefore affirm in part, reverse in part, and remand for further proceedings.

I

STATEMENT OF THE CASE

Camping Construction Company ("Camping") is a California corporation engaged in the business of constructing mini-storage facilities. The District Council of Iron Workers of the State of California and Vicinity (the "District Council") is a voluntary, unincorporated association comprising affiliated local labor unions, including Iron Workers Local Union 378 ("Local 378"). Both the District Council and Local 378 are "labor organization[s]" as that term is defined by the Labor Management Relations Act, 29 U.S.C. § 152(5).

On October 1, 1978, Camping and the District Council entered into a "prehire" collective-bargaining agreement [1] known as the Iron Workers Independent Agreement. In signing this agreement, Camping agreed to abide by the terms and conditions of employment set forth in the District Council's 1977-1980 Master Agreement, and "to comply with . . . any amendments, modifications, changes, extensions or renewals of or to said Master Agreement which may be negotiated by the parties thereto." Camping employed union laborers in compliance with the agreements for a short time; however, this practice ceased sometime in 1979, and on February 1, 1980, the administrator of the California Field Iron Workers Trust Funds notified Camping that it was being placed on the "inactive list" because it had not reported the employment of any Iron Workers for the preceding six months.

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[1] A "prehire" agreement is one negotiated by an employer and a union before the employer actually needs any laborers. Congress has specifically approved the use of such agreements in the construction industry due to its special characteristics. 29 U.S.C. § 158(f). *See generally Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265-67, 103 S.Ct. 1753, 1756-57, L.Ed.2d 830 (1983); *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1127-28 (9th Cir.1988) (*en banc*) ("*Mesa Verde II*").

On February 21, 1980, the District Council informed Camping by mail of its "desire to open the collective bargaining agreement of July 1, 1980 to negotiate changes, modifications, extensions and renewals." The contractor did not respond to the District Council's notice, and it is undisputed that after receiving this notice Camping never engaged in any collective bargaining or executed any further agreements. However, neither did Camping take any formal action to repudiate the agreement or to prevent its automatic renewal.

Since at least June 30, 1980, Camping has subcontracted out all iron workers' work to nonunion companies at various projects throughout northern California. The contractor contends without dispute that since that time it has not used the union hiring hall, submitted fringe benefit contributions, or in any fashion operated under the terms of the agreements. Camping further asserts that its noncompliance with the agreements was well known in the industry, and that several unions (we are not told whether they included the defendants) regarded Camping as a nonunion contractor and picketed some of its projects on that basis. The unions assert, however, that the District Council, through the administrator of the California Field Iron Workers Administrative Trust (the "Administrator"), sent Camping no fewer than eleven notices of changes, amendments, and modifications between July 23, 1980, and June 5, 1987, all of which strongly suggest that the unions involved in this litigation believed Camping was still bound by the Master Agreement.

On February 27, 1987, Local 378 filed a grievance against Camping according to the grievance procedures set forth in the 1986-1989 Master Agreement, which the unions characterize as "an amendment, modification, change and renewal of the previous Master Agreements negotiated between the District Council of Iron Workers and the Employers Association." Section 28 of that agree-

ment provides for the settlement of all grievances, other than jurisdictional disputes, by Boards of Adjustment which "shall have the power to adjust any differences that may arise regarding the meaning and enforcement of this Agreement." Local 378 claimed that Camping, by performing one of its jobs with nonunion labor, was violating two sections of the Master Agreement: section 20-B (governing the hiring of subcontractors) and section 5 (governing the use of the union hiring hall). The Administrator sent a copy of the grievance to Camping on March 9, along with a letter asking Camping to contact the administrator's office to schedule a meeting at which the grievance might be heard. Camping made no immediate response to this letter. On May 13, Camping received notice that a Board of Adjustment would be appointed to hear the grievance June 4. On May 26, Camping responded by requesting a postponement, and the Board notified Camping on June 2 that this request would be considered at the June 4 hearing.

Camping's counsel made a "special appearance" on June 4 in order to argue to the Board of Adjustment that it lacked jurisdiction over Camping because Camping was no longer bound to comply with the Master Agreement. In a letter of the same date, Camping's counsel explained to the Administrator that Camping regarded the District Council's letter of February 21, 1980, as a notice of termination pursuant to section 34 of the Agreement. The Board granted Camping's request for a postponement of the hearing.

On June 18, Local 378 filed another grievance against Camping, this time alleging hiring hall violations with respect to a different construction site. Notice of this second grievance was sent to Camping on June 23, again with a request that Camping contact the Administrator to schedule a grievance proceeding. Camping then filed with the district court a complaint for an injunction staying arbitration and for a declaration that Camping

was no longer obligated to comply with the Master Agreement because (a) the District Council's letter of February 21, 1980, constituted a termination notice; and (b) Camping's subsequent conduct had served to repudiate the earlier agreement.

Two months later, Camping's motion for a preliminary injunction staying the arbitration came on before the Hon. Charles A. Legge, sitting in the absence of the Hon. Samuel Conti. Judge Legge noted that where the existence of an agreement to arbitrate is in dispute, that question is properly decided by a court prior to arbitration. He then concluded that Camping had shown a sufficient probability that it would succeed in showing that no such agreement existed. He further concluded that Camping might suffer irreparable harm if the arbitration went forward, for which it might lack an adequate remedy at law; and that the balance of hardships favored the granting of the requested relief. Accordingly, the court granted the preliminary injunction. The union appealed pursuant to 28 U.S.C. § 1292(a)(1).

The parties then filed cross-motions for summary judgment. Camping contended that the agreement had either been terminated by the District Council or repudiated by Camping's conduct; the unions argued that the questions of termination or repudiation, as well as the underlying disputes, were for the arbitration Board rather than the court to decide. On April 22, 1988, Judge Conti granted summary judgment for the unions, holding that both termination under the agreement and repudiation by conduct were arbitrable issues which the court could review only upon a motion to confirm or vacate the arbitration award. Camping's motion for reconsideration was denied on July 18, almost exactly one year after it filed its complaint. However, Judge Conti granted Camping's motion for a stay of its order pending appeal. Noting that the preliminary injunction was on appeal to this court, Judge Conti stated that he would

"follow Judge Legge's determination and stay arbitration in this matter pending appeal." Camping timely filed its notice of appeal.

II

TERMINATION AND REPUDIATION

The Supreme Court recently reaffirmed as a "first principle" of federal labor law over the last thirty years the rule that " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960), and *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71, 80 S.Ct. 1343, 1347, 4 L.Ed.2d 1403 (1960)). The Court continued:

> The second rule, which follows inexorably from the first, is that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate a particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the aribtrator.

AT & T Technologies, 475 U.S. at 649, 106 S.Ct. at 1418.

However, the *AT & T Technologies* Court also recognized other principles of labor law that are no less compelling. One of these

> is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, in-

> deed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.

475 U.S. at 649-50, 106 S.Ct. at 1419. Moreover, the *AT & T Technologies* Court also regarded it as

> established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

475 U.S. at 650, 106 S.Ct. at 1419 (quoting *Warrior & Gulf*, 363 U.S. at 582-83, 80 S.Ct. at 1353). Consideration of these four principles led the *AT & T Technologies* Court to conclude that an agreement to arbitrate "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" did not give an arbitrator the jurisdiction to determine arbitrability itself. 475 U.S. at 651-52, 106 S.Ct. at 1419.

The case before us presents a different question from the one before the Court in *AT & T Technologies*. There, the issue was whether, under the specific terms of a collective-bargaining agreement, a particular grievance was arbitrable. Instead of deciding the jurisdictional issue—and determining as they could have that the grievance was arbitrable—the district court and the court of appeals held that a court and the court of appeals held that it was up to the arbitrator to determine the question of arbitrability. Here, neither party denies that the underlying grievances filed by Local 378 fall squarely within the jurisdiction granted to the arbitration board

under the terms of the prehire agreement. However, the parties disagree strongly over whether, prior to the filing of the grievances, the collective-bargaining agreement containing the arbitration clause had been (1) terminated under the provisions of the contract's termination clause; or (2) repudiated as a result of some action or conduct no Camping's part [2]—and whether those two

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[2] Under the law applicable to this appeal, an employer could extinguish its obligations under a prehire collective-bargaining agreement not only by complying with the termination provisions (if any) of the agreement itself, but also by unilaterally "repudiating" the agreement. Because of our disposition of this case, we need not discuss the various ways in which repudiation could be accomplished. We note here, however, that following the National Labor Relations Board's interpretation of the relevant statutes, an *en banc* court has abolished the unilateral repudiation doctrine in this circuit. *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1126 (9th Cir.1988) (*en banc*) ("*Mesa Verde II*") (following *Deklewa v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 3*, 282 N.L.R.B. No. 184, 1986-87 NLRB Dec. (CCH) ¶ 18,549 (Feb. 20, 1987), *enforced sub nom. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988)). The *Mesa Verde II en banc* court remanded to the original panel to determine whether the NLRB's *Deklewa* decision should be applied retroactively. *Mesa Verde II*, 861 F.2d at 1126. That panel held that the *Deklewa* rule would not be applied to employers who repudiated prior to February 20, 1987, the date of the *Deklewa* decision. *Mesa Verde Constr. Co. v. Northern Dist. Council of Laborers*, 895 F.2d 516, 520 (9th Cir.1990) ("*Mesa Verde III*"), *cert. denied*, —— U.S. ——, 111 S.Ct. 209, 112 L.Ed.2d 169 (1990). Thus, pre-*Deklewa* law determines whether Camping successfully repudiated its prehire agreement prior to February 20, 1987. We note in passing that in its June 4, 1987, letter to the Administrator setting forth its jurisdictional objections to arbitration Camping relied exclusively on its termination argument and made no claim that the agreement had been repudiated, either expressly or as a result of any conduct on the part of either party. We also note that while we are no longer the only circuit refusing to apply *Deklewa* retrospectively, *see United Bhd. of Carpenters and Joiners Local Union 953 v. Mar-Len of Louisiana, Inc.*, 906 F.2d 200 (5th Cir. 1990), we were the first circuit to do so and are still in the minority. *See NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir.1990); *NLRB*

questions are themselves subject to arbitration. Unlike the lower courts in *AT & T Technologies*, the district court here did not say that the question of arbitrability was for the arbitrator rather than the court. Instead, as was proper, the court itself ruled on the arbitrability question, and concluded that both the termination issue and the repudiation issue were arbitrable.

In *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distributor Co.*, we set forth the general rule applicable in cases presenting questions relating to disputes over termination or repudiation of collective-bargaining agreements: "[W]hen the collective bargaining agreement contains a customary arbitration clause acts of repudiation and other acts of termination must be submitted to arbitration." 832 F.2d 507, 511 n. 4 (9th Cir.1987). That rule applies whether the dispute between the parties is solely over termination or repudiation, or whether, as here, their disagreement over that question is a threshold issue that must be resolved before the underlying dispute can be reached. Thus, in the ordinary case, the district court's determination that both the issues of termination and repudiation were arbitrable would have been correct. However, in *Interstate Distributor* we also recognized that there is a narrow exception to the general rule under pre-*Dekleva*[3] law: when a *prehire* contract is involved, an employer's claim that it has effectively *repudiated* the contract containing the agreement to arbitrate is not arbitrable; that question must be decided by a court rather than an arbitrator. *Id.* (citing *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 820 F.2d 1006, 1009 (9th Cir. 1987) ("*Mesa Verde I*"); *Ion Constr. Co. v. District Council of Painters, No. 16*, 803 F.2d 1050, 1051 (9th

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v. *W.L. Miller Co.*, 871 F.2d 745 (8th Cir.1989); *International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.1988).

[3] See note 2 *supra*.

Cir.1986)). Our pre-*Deklewa* exception was based on the fact that the right to repudiate a right created by the collective-bargaining agreement itself or by general principles of contract law, but rather by a federal statute. *Interstate Distributor*, 832 F.2d at 511 n. 4.

As *Interstate Distributor* makes clear, the pre-*Deklewa* prehire contract exception is limited to questions of repudiation and does not apply to questions of termination. When a collective-bargaining agreement contains the usual broad arbitration clause, a dispute over contract termination is arbitrable, regardless of whether a prehire contract is involved. The court's role in such cases is a fairly simple one. It must examine the arbitration clause and determine whether it is of the type referred to in *Interstate Distributor*. If so, the dispute is arbitrable, and the arbitrator rather than the court must examine the facts, construe the termination provision of the contract, and decide whether the contract has in fact been terminated. Usually, labor arbitration clauses are broad enough to cover disputes over termination. *E.g.*, *Interstate Distributor*, 832 F.2d at 511; *George Day Constr. Co., Inc. v. United Bhd. of Carpenters & Joiners, Local 354*, 722 F.2d 1471 (9th Cir.1984). An agreement to arbitrate "any grievance or controversy affecting the mutual relations of the [parties]," *see Interstate Distributor*, 832 F.2d at 510 n. 2, or, as here, an agreement to arbitrate "any differences that may arise regarding the meaning and enforcement of this Agreement," or any other broad arbitration clause, such as "any dispute arising out of this Agreement," ordinarily requires us to hold that the parties have provided for arbitration of disputes regarding termination—and repudiation as well, except where the pre-*Deklewa* exception for prehire contracts applies.[4]

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[4] *LAWI/CSA Consolidators, Inc. v. Wholesale & Retail Food Distribution, Teamsters Local 63*, 849 F.2d 1236 (9th Cir.1988), is not to the contrary. The *LAWI/CSA* court properly acknowl-

These observations make it clear that the district court was correct in ruling that whether the District Council's letter served to *terminate* the contract was a question for a board of adjustment to determine. The dispute over termination is, as the district court held, arbitrable under the agreement at issue here. However, the district court erred in ruling that the effectiveness of Camping's purported *repudiation* of the prehire agreement should also be submitted to arbitration. Because (1) repudiation rather than termination was at issue; (2) the contract was a prehire agreement rather than a regular collective-bargaining agreement; *and* (3) at least some of the alleged acts of repudiation occurred before February 20, 1987, when pre-*Deklewa* law applied;[5] the question of repudiation was for the court rather than the arbitrator to resolve. In granting a total summary judgment for the unions on the arbitrability issue, the district court failed to recognize the "narrow exception" for repudiation of prehire contracts, carved out in *Ion Construction* and clearly acknowledged in *Interstate Distributor*.

The district court was aware of, and correctly interpreted, our decision in *Ion Construction* establishing the prehire repudiation exception, as well as the original

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edged the rule of *Interstate Distributor*, but distinguished that case on the ground that the arbitration clause in *LAWI/CSA* was different from the one involved in *Interstate Distributor*. *Id.* at 1239. In its opinion, the *LAWI/CSA* court did not quote the applicable arbitration clause, but in light of our statement in *Interstate Distributor* that under a "*customary* arbitration clause acts of repudiation and other acts of termination must be submitted to arbitration," 832 F.2d at 511 n. 4 (emphasis added), we must presume that the parties in *LAWI/CSA* had adopted a narrower and more limited arbitration clause than is customarily incorporated in collective-bargaining agreements.

[5] Under *Mesa Verde III*, alleged acts of repudiation after February 20, 1987, could not serve as a basis for a finding (by either the court or an arbitration board) that the contract had been repudiated, because *Deklewa* precludes unilateral repudiation after that date. *Mesa Verde III*, 895 F.2d at 520.

panel opinion in *Mesa Verde I*, 820 F.2d 1006, 1009-13 (9th Cir.1987). However, it apparently believed that after *Interstate Distributor* these "[p]rior inconsistent decisions . . . do not control." It is, of course, true that our earlier decisions on repudiation of prehire contracts will soon hold only historical interest; the district court's conclusion that *Ion Construction* and *Mesa Verde I* have been superseded will become law once we have decided all of the cases to which pre-*Deklewa* rules are applicable. However, this will be a result of the National Labor Relations Board's decision in *Deklewa* and ours in *Mesa Verde II*, not our decision in *Interstate Distributor*. To the contrary, in *Interstate Distributor* we were obligated to recognize the continued validity of *Ion Construction* and the now-superseded opinion in *Mesa Verde I*, and we did so explicitly; however, we also explained explicitly that those cases applied only to claims of repudiation of prehire agreements. 832 F.2d at 511 n. 4. Thus, pre-*Deklewa* law in this circuit included both the rule of *Interstate Distributor* and the *Ion Construction* exception, not merely one or the other. Post-*Dewlewa* law is, fortunately, far simpler. Only the *Interstate Construction* exception will shortly die a well-deserved natural death. For now, however, and on remand in particular, courts in our circuit must continue to apply pre-*Deklewa* law to any alleged acts of repudiation that occurred before February 20, 1987.

Much of the confusion over issues like the ones before us today is attributable to the fact that the deceptively simple dichotomy set forth in *AT & T Technologies*—between "arbitrability" and "the merits"—is ill-suited to cases like the instant one. Where an employer raises an issue of termination or repudiation in defense to an otherwise plainly arbitrable grievance, the issue can be framed in two very different ways, as we observed in *Interstate Distributor*, 832 F.2d at 511. In this case, for instance, we say that the district court was called upon to determine the arbitrability of the termination and repudiation

issues themselves; we then say that the court was correct in exercising jurisdiction over the question of arbitrability, and that it was correct in deciding that the issue of termination was arbitrable, but that it was incorrect when it reached that same result with respect to the repudiation issue. This, as we said in *Interstate Distributor*, is the preferred analytical approach.

Alternatively, we could have said that the question before the district court was the arbitrability of the underlying grievances—which were over hiring and subcontracting and were thus clearly arbitrable if the contract was still in effect—and that by referring "the merits" of the issues of repudiation and termination to the arbitrator, the court held that the question of "arbitrability" (of the underlying grievances) was itself arbitrable. As we pointed out in *Interstate Distributor*, such an analysis is possible because the parties are free to agree to arbitrate issues of arbitrability. Were we to apply that analytical aproach here, we would conclude that the district court was correct in holding that, under the contract, disputes over termination are themselves arbitrable, and in that sence the issue of the arbitrability of the underlying grievances *is* for the arbitrator. At the same time, viewing the collective-bargaining agreement in light of pre-*Deklewa* law, we would have to conclude that the parties did *not* agree to submit controversies over repudiation to the arbitrator; therefore, to the extent that "arbitrability" of the underlying grievances is governed by the "merits" of the repudiation issue, arbitrability must be decided by the court. Thus, here, as in *Interstate Distributor*, the outcome is the same whichever approach we adopt.

It is worth noting that similar issues do not generally arise when the question is whether the parties actually entered into a collective-bargaining agreement. In cases presenting that issue, one of the parties is usually arguing that there is no arbitration agreement at

all, because the contract containing the arbitration clause was never fully agreed to. In such cases, the basic *AT & T Technologies* rule applies. The court must determine whether a contract *ever* existed; unless that issue is decided in favor of the party seeking arbitration, there is no basis for submitting any question to an arbitrator. As we have noted, however, once it is found that a contract did exist at some time, the questions of whether that contract has expired, or has been terminated or repudiated, may well present arbitrable issues, depending on the language of the agreed-upon aribtration clause.

Thus, we affirm the district court insofar as it held that an arbitration board must decide whether, as Camping claims, the District Council's letter of February 21, 1980, effected a valid termination of Camping's contractural obligations under the 1977-1980 Master Agreement. However, we must reverse the district court's determination that the issue of repudiation was also arbitrable. The question of repudiation, at least with respect to any conduct allegedly occurring before February 20, 1987, was for the district court to determine. Since Judge Conti believed the court lacked jurisdiction over that question, he did not reach the merits of the repudiation issue. Therefore, we must remand the repudiation question to the district court for its determination on the merits.

III

THE NORRIS-LaGUARDIA ACT

Having disposed of Camping's appeal of the order of summary judgment, we turn to the unions' interlocutory appeal of the district court's order staying arbitration proceedings pending its resolution of the arbitrability issue. The unions argue here, as they did in the district court, that such an order is subject to the limitations imposed by the Norris-LaGuardia Act, 47 Stat. 70-73, 29 U.S.C. §§ 101-115. By that act Congress severely re-

tricted the jurisdiction of the federal courts to issue injunctions in "any labor dispute." Section 1 provides,

> No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shal any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101.[6] The "provisions of this chapter" to which section 1 refers include section 4 of the Act, which sets forth a list of specific acts against which the federal courts may under no circumstances issue an injunction.[7]

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[6] The "public policy declared in this chapter" is set forth in section 2 of the Act, 29 U.S.C. § 102.

[7] Section 4 provides,

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

In addition, sections 7 and 9 of the Act impose a number of substantive and procedural conditions on the availability of injunctive relief in all other cases involving or growing out of a labor dispute,[8] and section 8 prohibits

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(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of thier interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 104. The unions do not contend that the district court's order violated section 4.

[8] Section 7 provides, in pertinent part,

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . .;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct,

an award of injunctive relief to "any complainant . . . who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration." 29 U.S.C. § 108. According to the unions, the district court's failure to abide by the conditions of the Act requires us to vacate the district court's injunction.

> to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property. . . . [Temporary restraining orders may be granted when somewhat less exacting requirements are met, but they may not remain in effect longer than five days.] No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

29 U.S.C. § 107.

Section 9 specifies additional procedural safeguards, as well as a limitation on the substantive scope of any injunction ultimately issued:

> No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

29 U.S.C. § 109.

We note that the same contention was pressed in *Mesa Verde*, but the original panel opinion in that case rejected the argument as moot. *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 820 F.2d 1006, 1009 (*Mesa Verde I*), *reh'g granted en banc*, 832 F.2d 1164 (9th Cir. 1987), *remanded*, 861 F.2d 1124 (9th Cir. 1988). In this case, however, it is not. Here, there will be arbitrable issues remaining after our decision, including not only the termination issue but the merits of the two grievances as well. There will also be an issue of repudiation for the district court to decide. Thus, the district court will again be faced with the decision whether to stay the arbitration—this time, while it decides whether Camping has repudiated the contract. Under these circumstances, the case has not "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 201, 24 L.Ed. 2d 214 (1969) (*per curiam*), quoted in *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 853-54 (9th Cir. 1985); *see also United States v. Oregon*, 657 F.2d 1009, 1012 n. 7 (9th Cir.1981) (*per curiam*), Kennedy, J.) (appeal of expired preliminary injunction is not moot where "issues raised . . . are of an enduring nature," they "go to the very core of the court's power to hear this controversy," and they are likely to recur in the case). Moreover, in this case, following its grant of summary judgment, the district court noted that the preliminary injunction had been noted that the preliminary injunction had been appealed to this court and on that basis decided to "follow Judge Legge's determination and stay arbitration in this matter pending appeal." Thus, the district court's exercise of its injunctive powers without regard for the provisions of the Norris-LaGuardia Act presents a very live controversy in the most traditional sense.

A

We take as our starting point the language of the Norris-LaGuardia Act itself, which presents a formidable

obstacle to Camping's claim that the district court was not required to comply with that statute. The Act by its terms applies to any "case involving or growing out of a labor dispute," 29 U.S.C. §§ 101, 107, 109; *cf.* §§ 104, 108. Section 13 defines the phrase "labor dispute" to include[] any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the diputants stand in the proximate relation of employer and employee." 29 U.S.C. 113(c). This definition is extraordinarily broad, and the Supreme Court has so interpreted it. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 712-14, 102 S.Ct. 2672, 2680-81, 73 L.Ed.2d 327 (1982) (quoting *Columbia River Packers Ass'n, Inc. v. Hinton*, 315 U.S. 143, 147, 62 S.Ct. 520, 522, 86 L.Ed. 750 (1942)) (a union's work stoppage, although motivated exclusively by geopolitical concerns, is a labor dispute because "the employer-employee relationship [is] the matrix of the controversy"); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 559-61, 58 S.Ct. 703, 707, 82 L.Ed. 1012 (1938) (finding that picketers who were neither employees nor union organizers, and who were asserting political and social interests rather than economic interests commonly associated with labor unions, were persons interested in a labor dispute within the meaning of section 13). The language of the Act, and the cases interpreting it, leave us with absolutely no doubt that Camping and the unions are engaged in a labor dispute within the literal terms of the Act.

Nor can it be argued that the type of injunctive relief granted below is not coverered by the literal provisions of the Act. Although we have never addressed this precise question before, we have clearly held that an order staying arbitration is a "classic form of injunction," not "a mere step in the controlling of litigation before the court." *A. & E. Plastik Pak Co., Inc. v. Monsanto Co.*, 396 F.2d

710, 713 (9th Cir.1968) (order denying stay of nonlabor arbitration is an order denying a temporary injunction, and may therefore be the subject of an interlocutory appeal under 28 U.S.C. § 1292(a)(1)). Although *A. & E. Plastik Pak* was not a labor case, we can think of no reason why an order staying a labor case is any less an injunction. *Accord In re District No. 1—Pacific Coast Dist., Marine Eng'rs' Beneficial Ass'n*, 723 F.2d 70 (D.C. Cir. 1983); *Jou-Jou Designs, Inc. v. International Ladies Garment Workers Union*, 643 F.2d 905 (2d Cir.1981). Thus we have before us a preliminary injunction issued by a federal court in a labor dispute, and there can be little doubt that under a literal reading of Norris-LaGuardia, the Act applies to the district court's stay of the arbitration proceedings.

B

With many statutes our inquiry would end with the discovery of a literal meaning so plain. However, the Supreme Court has made it clear that the Norris-LaGuardia Act is not necessarily to be construed literally in all circumstances. Enacted in 1932, the Norris-LaGuardia Act is one of the oldest surviving pieces of labor legislation in this country. More recent acts providing for more extensive regulation of labor-management relations (such as the Wagner Act, the Taft-Hartley Act, and Title VII of the Civil Rights Act of 1964) have changed the face of labor law in the United States, yet there has been so accompanying revision of the Norris-LaGuardia Act. The courts have thus been left with the task of attempting to accommodate Norris-LaGuardia to later acts in order to create a coherent whole. *See generally Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 242-53, 90 S.Ct. 1583, 1584-88, 26 L.Ed. 2d 199 (1970). The result has been that, in spite of what the Norris-LaGuardia Act says, the Supreme Court has held that federal courts *do* have jurisdiction to issue injunctions in *some* labor disputes, even in some of the

circumstances covered by section 4's outright ban. For example, it has long been settled that federal courts have jurisdiction, in spite of the Norris-LaGuardia Act, to compel a recalcitrant employer to honor its agreement to arbitrate. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457-59, 77 S.Ct. 912, 918-19, 1 L.Ed.2d 972 (1957). Moreover, when a union refuses to honor its contractual commitment to arbitrate and instead calls a strike, a federal court may grant a prohibitory injunction against the strike, *Boys Markets*, 398 U.S. at 253-54, 90 S.Ct. at 1594, as long as the dispute underlying the strike is arbitrable, *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407-12, 96 S.Ct. 3141, 3147-50, 49 L.Ed.2d 1022 (1976); *see also Jacksonville Bulk Terminals*, 457 U.S. at 708-09, 102 S.Ct. at 2678. And among the earliest of these accommodation cases were cases in which the Court held that Norris-LaGuardia does not prevent courts from issuing injunctions to enforce positive duties imposed by other federal labor statutes. *See, e.g., Brotherhood of R.R. Trainmen v. Chicago River & Ind. Ry.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957) (union's statutory duty to arbitrate "minor disputes" under the Railway Labor Act); *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed.2d 1283 (1952) (union's duty under RLA not to discriminate against non-union black train porters); *Graham v. Brotherhood of Locomotive Firemen & Eng's*, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949) (union's duty under RLA, as the exclusive bargaining representaitve, to provide nondiscriminatory representation); *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937) (employer's duty under RLA to recognize and negotiate with the duly accredited labor representative).

The preliminary injunction granted below cannot be sustained on the rationale of any of these existing exceptions to the Act. Camping concedes as much, but asserts that we should make a new accommodation, one it con-

siders similar. This argument is based not on the necessity of accommodating the 1934 legislation to the policies reflected in some newer federal statute, but rather on the employer's view of the policy behind the Norris-LaGuardia Act itself. According to Camping:

> The Norris-LaGuardia Act was enacted in response to the use of injunctions as a weapon against employee concerted activity. (Section 2, 29 U.S.C. § 102). Historically, injunctions prohibiting such concerted activity often had the effect of tipping the balance in favor of one or the other of the parties to a labor dispute, since strikes and other concerted actiivty were time-sensitive. . . . In this case, the underlying policy behind the Norris-LaGuardia Act is not called into play, since concerted activity is not involved.

Thus, Camping would apparently have us hold that the Act protects only strikes, or other disruptive group conduct. The employer cites no authority for this policy analysis, and we find no support for it in federal labor law. In fact, a host of considerations militate against Camping's proposal that the Norris-LaGuardia Act be limited in any such way.

First, limiting the Act to disruptive group conduct, or indeed any group conduct, would render much of the Act's language and structure superfluous, if not incomprehensible. "Ceasing or refusing to perform any work or to remain in any relation of employment" is only one of the many acts specifically protected against any and all injunctions under section 4. Others include, for example, joining a union, joining an employer organization, publicizing the existence of a labor dispute, and assembling peaceably to assert collective interests. 29 U.S.C. § 104. Thus, even the specific statutory prohibitions are far broader than Camping would permit. Given that Congress did not stop with section 4, but rather added a number of other sections dealing with injunctions against acts that

are *not* specifically mentioned in section 4, we cannot possibly construe these less exacting provisions to apply to even fewer situations than those specifically mentioned in that section.

Second, decisions from both the Supreme Court and the courts of appeals clearly contradict the proposed limitation. For instance, a number of early decisions in which the Supreme Court *did* allow injunctions against activities other than strikes were based not on Camping's rationale, but rather on the ground that the injunction merely enforced a more recent federal labor statute. *See, e.g., Lincoln Mills*, 353 U.S. at 457-59, 77 S.Ct. at 918-19; *Graham*, 338 U.S. at 237-40, 70 S.Ct. at 17-18; *Virginian Railway*, 300 U.S. at 562-63, 57 S.Ct. at 606. Certainly the limitation proposed by Camping would have provided a much tidier rationale for those cases if it were sound; the Court's more circuitous route to the result leads us to believe it is not. In addition, other courts of appeals have unhesitatingly applied the Act to forbid injunctions against acts other than concerted activity by a union. It is well settled, for example, that, as the Act explicitly provides, it applies in appropriate circumstances when injunctions are sought against employers. *See generally* H. Perritt, *Labor Injunctions* 169-204 (1986 & 1990 Supp.), and cases cited therein.

Third, there is something strange in the suggestion that a federal labor statute should be applied so as to protect the right to strike but not the right to arbitrate. Modern labor law is largely dedicated to attempting to reduce the need for strikes and other disruptions of social and economic stability caused by labor unrest, and to encourage the use of methods of dispute resolution more conducive to harmonious relations between labor and management—namely, collective bargaining and arbitration. "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application

or interpretation of an existing collective bargaining agreement. . . ." 29 U.S.C. § 173(d); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 377, 94 S.Ct. 629, 636, 38 L.Ed.2d 583 (1974); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403 (1960). This method is not only the most likely to succeed, but may also be the most therapeutic for the parties to the dispute. 363 U.S. at 568, 568 n. 6, 80 S.Ct. at 1346, 1347 n. 6.

Arbitration is designed to settle labor disputes quickly, as they arise; much of its value is lost if it is stayed by a federal court. Congress has quite recently recognized this outside the labor context in enacting an amendment to the Federal Arbitration Act, 9 U.S.C. §§ 1-15. Section 15 now provides generally for interlocutory appeals from orders "impeding the expeditious disposition of an arbitration," 9 U.S.C.A. § 15 ("Practice Commentary"), but not from orders compelling arbitration, directing arbitration to proceed, refusing to enjoin an arbitration, or staying a judicial proceeding pending an arbitrator's resolution of an arbitrable issue. Given the special importance attached to arbitration in the labor field, we believe delay occasioned by judicial interference is even less to be countenanced in that area. Indeed, even Camping must concede that our national labor policy is hostile to the three-year delay thus far occasioned by the district court's orders in this case.

Fourth, the Norris-LaGuardia Act embodies this aspect of national labor policy particularly plainly, by attaching special importance to the availability of arbitration as a way of resolving a labor dispute. As the Supreme Court stated in *Lincoln Mills*, "Section 8 of the Norris-LaGuardia Act does, indeed, indicate a congressional policy toward settlement of labor disputes by arbitration, for it *denies injunctive relief* to any person who has failed to make 'every reasonable effort' to settle the dispute by negotiation, mediation, or 'voluntary arbitration.'" 353 U.S. at 458, 77 S.Ct. at 918 (emphasis

added). Hence the exception urged by Camping would not only be contrary to labor policy in general; it would be directly antithetical to the express policies underlying the Act.

Our analysis of the purposes underlying the Act is fortified by a consideration of the cases in which the Supreme Court *has* created an exception to the literal strictures of the Norris-LaGuardia Act. Every such case we have discovered accommodates the Act either to a duty specifically imposed by another statute, or to the strong federal policy favoring labor arbitration. *See, e.g., Boys Markets*, 398 U.S. at 249-53, 90 S.Ct. at 1587-88; *Lincoln Mills*, 353 U.S. at 457-59, 77 S.Ct. at 918-19; *Chicago River*, 353 U.S. at 40-42, 77 S.Ct. at 640-41; *Graham*, 338 U.S. at 237-40, 70 S.Ct. at 17-18; *Virginian Railway*, 300 U.S. at 562-63, 57 S.Ct. at 606. The Supreme Court has in recent years stated this generalization in such a way as to suggest that exceptions to Norris-LaGuardia are limited by this principle. *See Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, —— U.S. ——, 109 S.Ct. 2584, 2598, 105 L.Ed.2d 415 (1989); *Jacksonville Bulk Terminals*, 457 U.S. at 717 n. 17, 102 S.Ct. at 2682 n. 17.

The pro-arbitration stance of the accommodation doctrine is well illustrated by *Boys Markets* and the subsequent refinement of that case in *Buffalo Forge*. In *Boys Markets*, the Supreme Court held that notwithstanding section 4 of the Norris-LaGuardia Act, a federal court could enforce the "no strike" provision of a collective-bargaining agreement by enjoining strikes in violation of the agreement and compelling arbitration. Later, in *Buffalo Forge*, the Court explained.

> The driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties. Only to that extent was it held necessary to accommodate § 4 of the Norris-LaGuardia Act to § 301 of the Labor Management Relations Act

> and to lift the former's ban against the issuance of injunctions in labor disputes. Striking over an arbitrable dispute would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute.

Buffalo Forge, 428 U.S. at 407, 96 S.Ct. at 3147. The *Boys Markets* exception to Norris-LaGuardia was so completely grounded upon the strong federal policy in favor of labor arbitration that in *Buffalo Forge* the Court limited the exception to strikes over *arbitrable* disputes. Hence, when a union is merely striking, rather than striking *over something it should be arbitrating*, the Norris-LaGuardia Act applies with full force. 428 U.S. at 407-11, 96 S.Ct. at 3147-49.

Against the background these cases provide, it is quite apparent that the exception urged on us by Camping is not merely *outside* the prior accommodation cases, but rather *contrary* to them. While prior cases have allowed equitable relief to enforce agreements to arbitrate, Camping sought and procured an order *precluding* arbitration, thereby offending the spirit and purpose of Norris-LaGuardia as well as its literal terms. The case is in this respect quite similar to *In re District No. 1*, in which the District of Columbia Circuit vacated a preliminary injunction staying a labor arbitration. That court recognized that federal labor policy, as specifically manifested in prior decisions under the Norris-LaGuardia Act, takes contractually agreed-upon arbitration to be the preferred solution to labor disputes, not a part of the problem. 723 F.2d at 77. As the court said there, "The least that *Lincoln Mills*, *American Manufacturing* and *Warrior & Gulf* require is that the parties to a collective bargaining agreement be allowed—indeed, required—to use their contractual grievance-arbitration procedure without intervention by a court." *Id.* at 78. The court then vacated the district court's stay on the ground that the district court failed to comply with the requirements of the Norris-LaGuardia Act. *Id.* at 79.

In denying a petition for rehearing in *In re District No. 1*, the court again drew attention to the public policy declared in the Act:

> It would be utterly ironic and ridiculous for us to hold, in the face of the explicit jurisdictional and public policy provisions of § 1, the specific requirement in § 8 compelling resort to arbitration as a prerequisite to any injunctive relief, and the undisputed fact that this case arises out of a labor dispute, that an injunction should nevertheless issue because injunctions against arbitration are not listed in § 4. Such a conclusion would effectively destroy substantial and important provisions of the Norris-LaGuardia Act.

723 F.2d at 81. It should be plain from our discussion thus far that we agree with the D.C. Circuit's assessment of the important public policies at stake here, as well as with its conclusion that Norris-LaGuardia applies to stays of labor arbitration proceedings.

Camping seeks to distinguish *In re District No. 1* on the ground that in our case there is a dispute over the existence of a collective-bargaining agreement rather than merely over the meaning of the provisions of an acknowledged contract. Camping apparently believes that Norris-LaGuardia applies only if it is clear that an agreement to arbitrate is actually in effect. We disagree. Even if the arbitrability of the grievances involved in *In re District No. 1* had been as free from doubt as Camping asserts, the D.C. Circuit's reasoning could not be distinguished on that ground. The Norris-LaGuardia Act is made applicable by virtue of the existence of a *labor dispute*, not the existence of an arbitrable dispute or, indeed, even of a collective-bargaining agreement. Perhaps the central application of the Act during its early years was to protect strikes called in order to pressure employers to enter into collective bargaining with a union.

The Act would scarcely have been such a milestone in the development of federal labor law if it had applied only where a collective-bargaining agreement already existed. Camping's suggestion that the Act does not apply when the existence of the collective-bargaining agreement is in doubt is simply indefensible in light of the fact that, historically, one of the principal purposes of the Act was to preclude injunctions where there was *clearly* no collective-bargaining agreement at all.

Alternatively, if Camping's argument is based on a theory regarding uncertainty as to the existence of an agreement to arbitrate rather than uncertainty as to the existence of a collective-bargaining agreement (and as a practical matter, the two are in many cases identical), it is no more persuasive. The fact that the dispute is over the existence or enforceability of an obligation to arbitrate (*i.e.*, arbitrability) makes it no less a dispute—and when an employer and a union are involved, no less a labor dispute. In short, we believe the D.C. Circuit's reasoning is just as compelling when the parties are engaged in a dispute over arbitrability as when the obligation to arbitrate is clear. Thus, we hold that the rule of *In re District No. 1* is fully applicable here as well as in the circumstances to which Camping would limit it.

In the end, we find that many distinct lines of reasoning lead us toward the conclusion that the district court was required to comply with the Norris-LaGuardia Act. No existing exception to the Act covers the case before us, and the new exception suggested by Camping is foreclosed not only by the language and purpose of the Act, but also by the holdings and rationales of many prior appellate decisions.

C

The only countervailing consideration that gives us any pause is the possibility that the order issued below could be justified as an injunction necessary to preserve the court's jurisdiction. According to this argument, a court

presented with a question of arbitrability should be able to stay arbitration long enough to decide whether the matter is arbitrable. This theory has some appeal, but we reject it, for three reasons. First, this is not a case where one statute fails to provide jurisdiction but jurisdiction is nonetheless present on some other ground. *Cf. Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 881 (2d Cir. 1981) (Title VII does not vest a federal court with jurisdiction to grant private plaintiffs' request for preliminary injunctive relief, but the court's inherent equity power does provide jurisdiction to do so). This is instead a case where a statute *divests* the court of jurisdiction to do a particular act, regardless of what the jurisdictional basis of the act would otherwise have been. Once a court is made aware that the controversy before it "involv[es] or grow[s] out of a labor dispute," it has no jurisdiction to issue injunctive relief except in conformity with the Norris-LaGuardia Act. Thus, although the "preservation of jurisdiction" rationale *might* support a stay imposed in order to permit the court to decide *whether the Norris-LaGuardia Act is applicable*, *cf. United States v. United Mine Workers*, 330 U.S. 258, 289-93, 67 S.Ct. 677, 693-96, 91 L.Ed. 884 (1947) (holding the Act inapplicable to the United States in its role as employer) it cannot support a stay pending a determination *whether a particular dispute is arbitrable.* The question of arbitrability has no bearing on whether or not the court is dealing with a labor dispute; and once it is clear that a labor dispute is involved, the court has no jurisdiction to grant any injunction except in compliance with the Norris-LaGuardia Act.

Second, the question is not really one of *preserving* federal jurisdiction; it is rather one of determining *when it should be exercised.* Arbitration awards are not self-enforcing; and unless an award persuades the party contesting the arbitrator's authority to comply voluntarily with its terms, it will have no binding effect on either party until it is confirmed in court. The reluctant party

to the arbitration therefore retains its right to a judicial determination of the arbitrator's jurisdiction; it will simply come after the arbitration rather than before. In light of the rule that courts must resolve any doubts about the arbitrator's jurisdiction in favor of arbitrability, *Warrior & Gulf*, 363 U.S. at 582-83, 80 S.Ct. at 1352-53, we believe it will be the exception rather than the rule that an arbitrator will assert jurisdiction over a dispute in which a court could have said before the arbitration "with *positive assurance* that the arbitration clause is *not susceptible* of an interpretation that covers the asserted dispute." *Id.* at 582-83, 80 S.Ct. at 1353 (emphasis added). In any event, a careful party in Camping's position, by preserving the arbitrability issue, will have the opportunity to have the court correct any such occasional error expeditiously. Certainly we find this procedure fairer and more efficient than requiring the party asserting arbitrability to go to federal court *twice:* once before the arbitration, on the issue of arbitrability, and once afterward, on the substantive issues raised by way of motions to enforce or vacate the arbitrator's award. We also, not incidentally, find it to be more consistent with Congress's approach to appealability under the Federal Arbitration Act, which clearly evidences a preference for erring in favor of arbitration and deferring the exercise of federal jurisdiction. *See* 9 U.S.C. § 15, discussed *supra*.

Finally, we note that the exercise of federal jurisdiction is subject to specific statutory limitations in this case, just as it is in any other. Thus, we do not hold that arbitrations of labor disputes may never be stayed or enjoined by federal courts; that issue is not before us. We decide only that Norris-LaGuardia is applicable to requests for such relief. In the case before us, the parties properly observe that arbitration is not one of the activities covered by section 4 of the Act. Hence the Act does not, on its face, completely prohibit courts from enjoining labor arbitration proceedings. It is only fair to add,

however, that other restrictions in the Act that are applicable to conduct not covered by section 4 are in effect almost as prohibitive when applied to attempts to enjoin labor arbitrations. Those restrictions are found in section 7 and 8. If judicial interference with a labor arbitration hearing is *ever* permissible under Norris-LaGuardia, the necessity of meeting the requirements of those sections will make such intervention a rare occurrence indeed.[9] Yet we do not find this prospect to be a sound argument for refusing to apply the statute as it is plainly written. To the contrary, we believe the general unavailability of injunctions against labor arbitrations properly reflects the fact that parties reluctant to arbitrate are not, as a general rule, unduly prejudiced by the deferral of federal jurisdiction. See Part III.D, *infra*.

In summary, we conclude that the court's general power to preserve its own jurisdiction cannot support the stay of arbitration granted below. Norris-LaGuardia conditions and delays the exercise of jurisdiction, but certainly does not destroy it; to the extent the court may be required to postpone the exercise of its jurisdiction, it will be due to Congress's explicit statement of its intention to restrict federal injunctive relief in cases involving labor disputes. The "preservation of jurisdiction" rationale thus provides no good reason for us to suspend the Act's re-

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[9] It is difficult to imagine, for example, how the commencement of a labor arbitration could constitute an "unlawful act" for the purposes of section 7(a). Assuming that the federal courts are "the public officers charged with the duty to protect [the] property [of the party resisting arbitration]," it would also appear to be difficult to satisfy section 7(e)'s requirement that the courts are "unable or unwilling to furnish such protection." It is equally difficult to imagine how a party seeking to enjoin an arbitration could show attempts at nonjudicial dispute resolution that would satisfy section 8. All of this is aside, of course, from the procedural requirements of section 9. We need not attempt to forecast how any of these requirements, or others imposed by the Act, will be interpreted in the future; we merely note the unlikelihood that all will be met in any given case.

quirements—and certainly not when the practical effect of doing so would be to encourage the issuance of injunctions designed to interfere with the orderly resolution of labor disputes.

D

Camping objects that application of the Norris-LaGuardia Act will force it to arbitrate disputes that may not be arbitrable, and that it will suffer irreparable injury as a result. Judge Legge apparently agreed, finding "a substantial likelihood that [Camping] would suffer irreparable harm if the arbitration were to proceed . . . . In addition, the balance of the hardship, should the arbitration proceed absent a stay, would tip towards [Camping]." Even aside from its failure to apply Norris-LaGuardia, the court was clearly in error. We note these errors because they are relevant to the analysis the district court will be required to make under section 7 of the Act if it again considers issuing an injunction on remand.

The district court's principal error lies in its assumption that unnecessarily undergoing arbitration proceedings constitutes irreparable injury. That is simply not the case. First, the party objecting to arbitration might well suffer no harm at all, irreparable or otherwise, for the arbitration panel might decide in its favor. Here, for example, Camping could prevail either on the termination issue or on the merits of the underlying grievances. A party which prevails at an arbitration to which it objects would probably save time and money by having the matter resolved in its favor in arbitration rather than in litigation. Second, even if the other party obtains a favorable award from the arbitrator, that award, as we noted in Part III.C *supra*, is not self-enforcing. Arbitration of disagreements arising under a collective-bargaining agreement is regarded as a continuation of the collective-bargaining process; an award, prior to judicial enforcement, is treated as simply a part of the contract.

Thus, it has no more effect than any provision of a collective-bargaining agreement normally has; it cannot by itself inflict anything like irreparable injury. Third, any arbitral award obtained by the party seeking arbitration will have no preclusive effect in a subsequent confirmation or *vacatur* proceeding as long as the objecting party has reserved its right to a judicial, rather than arbitral, determination of arbitrability. The law thus leaves parties like Camping with a perfectly adequate legal remedy for an improper award; the only remaining harm—the short time and slight expense involved in the typical arbitration—would scarcely qualify as irreparable injury. Nor can we say that the minor expense and inconvenience to the objecting party, including being the object of an outstanding unfavorable award, outweighs the other party's interests, of which the district court seems to have taken little notice in this case. We have pointed out above that a labor arbitration is likely to have therapeutic value even for the losing party or parties; this will only be true, however, if the arbitration takes place within a reasonable time after the grievance is filed. There are other, equally important reasons why speedy arbitration hearings are necessary—rapid turnover of the work force being one. Here, the lengthy delay caused by the preliminary injunction granted below represents near-total vitiation of the salutary effect which the typically quick and inexpensive arbitration is presumed to have on labor-management relations.

E

Camping's final argument is that we have previously approved of the concept of injunctive relief in cases like this, citing *George Day Constr. Co., Inc. v. United Bhd. of Carpenters & Joiners, Local 354*, 722 F.2d 1471 (9th Cir.1984). In *George Day* we refused to vacate an arbitration award that was based in part on the arbitrator's determination of his own jurisdiction. We held that the employer waived its right to a judicial determi-

nation of arbitrability by voluntarily submitting that question to the arbitrator. *Id.* at 1475-76. In response to the employer's contention that it had been virtually forced to submit the arbitrability question to the arbitrator in order to avoid default, we observed that "the employer could have taken the initiative by seeking declaratory and injunctive relief prior to the commencement of arbitration." *Id.* at 1476.

This was of course an *obiter dictum*, and we would be justified in departing from it if we thought we were required to do so, since the *George Day* court did not consider the Norris-LaGuardia Act. However, our decision in the instant case is not inconsistent with out remark in *George Day*. Even under today's decision, the employer may still seek declaratory and injunctive relief prior to the commencement of arbitration. If an employer were to obtain a judicial declaration of repudiation prior to the commencement of arbitration, then that declaration would be binding on the arbitrator in any later proceeding, if indeed the union were to proceed at all. And although we cannot imagine that an employer armed with a judicial declaration of repudiation would find it necessary to pursue a request for an injunction against an arbitration hearing that could not lead to an enforceable award, our decision does not preclude the making of such a request. Today, we hold only that the Norris-LaGuardia Act is applicable to orders enjoining labor arbitrations. Notwithstanding the serious doubts we have expressed regarding the ability of a party seeking such an order to meet all of the requirements of sections 7 and 8 of the Act, we do not here foreclose future litigants from advancing the argument that under extraordinary circumstances those conditions can all be met.

Finally, we note that here, as in *George Day*, the employer is the architect of its own predicament. Camping was not under any legal obligation to agree to a grievance procedure according to which it was possible for an

arbitration to go forward without either its consent or a court order. If it had not done so, the unions would have been forced to seek an order compelling arbitration under section 301, and the district court could have decided to defer its decision on the arbitrability question until after it had resolved the repudiation issue. Moreover, even under the existing agreement, Camping cannot be deprived of its right to a judicial determination of arbitrability, as we have previously noted. Here, as in *George Day*,

> the employer could have avoided the problem by simply [participating in the arbitration without] giving the arbitrability question to the arbitrator for decision. The employer merely had to voice its objection on the arbitrability issue and state on the record that it was reserving that question for later judicial determination. In this way, the question could be preserved for an independent judicial scrutiny at any subsequent proceeding for vacatur or enforcement.

Id. at 1476.

F

We conclude, for all of the reasons stated above, that the instant case "involv[es] or grow[s] out of a labor dispute," and is therefore subject to the provisions of the Norris-LaGuardia Act. No established exception excused the district court from complying with the requirements of that Act, and no new exception is warranted in the situation before us.

Because the district court made no attempt to comply with the Act, it is hardly surprising that its order fails to satisfy any of the various conditions set down by Congress. Since the court had no jurisdiction to enter a preliminary injunction except in compliance with the provisions of the Act, the injunction was issued unlawfully.

CONCLUSION

The district court correctly concluded that it was for a board of adjustment to determine whether the District Council's letter of February 21, 1980, effected a valid termination of Camping's contractual obligations under the 1977-1980 Master Agreement, and we affirm this portion of its order. However, the court erred in holding that the issue of repudiation was also arbitrable. We reverse summary judgment for the unions on that issue and remand to the district court to determine whether, prior to February 20, 1987, Camping effectively repudiated its prehire agreement under pre-*Deklewa* law. Finally, we hold that the Norris-LaGuardia Act is applicable to Camping's request for a preliminary injunction. Because the district court failed to apply the various provisions of the Act, the issuance of the injunction was in excess of the court's jurisdiction.

AFFIRMED in part and REVERSED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 87-3733 SC

CAMPING CONSTRUCTION COMPANY,
a California corporation,
Plaintiff,

—VS—

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, an unincorporated association and IRON WORKERS LOCAL UNION NO. 378, an unincorporated association,
Defendants.

ORDER DENYING MOTION FOR RECONSIDERATON AND GRANTING STAY PENDING APPEAL

[Filed Jul. 18, 1988]

On April 22, 1988 this court issued an order denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment. The court ruled that since the contract in dispute contained a broad arbitration clause, the question whether a particular act or failure to act effectively served to terminate the agreement was subject to arbitration. In its ruling, the court relied on the holding of the Ninth Circuit in *Brotherhood of Teamsters and Auto Truck Drivers Local #70 v. Interstate Distributor Company*, 832 F 2d 507, 511 (9th Cir. 1987) ("*Interstate*"). The matter is currently before the court on plaintiff's motion for reconsideration of

the court's order of April 22, 1988 or, in the alternative, for a stay of execution of judgment pending appeal.

The Federal Rules of Civil Procedure provide that a "motion to alter or amend the judgment shall be served not later than 10 days after judgment." Fed. R. Civ. P. 56(e). The motion may take the form of a motion for reconsideration. *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880 (9th Cir. 1983).

To support a motion for reconsideration of a grant of summary judgment based upon newly discovered evidence, the movant is obliged to show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing. *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985). A motion for reconsideration of a grant of summary judgment should be denied if the movant presents no evidence or arguments that had not already been raised in opposition to summary judgment. *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

A motion for reconsideration also may be brought under Fed. R. Civ. P. 60(b) if the movant can show (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud or other misconduct; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) any other reason justifying relief from operation of judgment. Relief under exception (6) above requires a finding of "extraordinary circumstances." *McConnell v. MEBA Medical & Benefits Plan*, 759 F.2d 1401, 1407 (9th Cir. 1985); *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

Plaintiff moves for reconsideration of the court's grant of summary judgment. Plaintiff argues that the court's opinion of April 22, 1988 fails to take proper consideration of a footnote in the Ninth Circuit's opinion in *Inter-*

state. Plaintiff argues that a district court may decide in the first instant whether an employer has effectively repudiated a prehire agreement. Defendants oppose plaintiff's motion. Defendants argue that U.S. Supreme Court decisions subsequent to the decisions relied upon by plaintiff demonstrate that the disputed issues in this case are arbitrable.

Plaintiff has not demonstrated that its case falls within any of the exceptions listed in Fed. R. Civ. P. 60(b). Plaintiff has not offered newly discovered evidence or law in support of its motion, but rather reasserts the same arguments and authorities presented in its motion for summary judgment. Plaintiff's motion for reconsideration is therefore denied.

Plaintiff also requests, in the alternative, that enforcement of the judgment in this action be stayed pending an appeal of this court's decision. Plaintiff argues that it is likely to succeed on the merits of this case, and also that it stands to suffer such extensive financial liability that plaintiff may be put out of business. Defendants oppose plaintiff's motion arguing that a stay of arbitration is a violation of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq*.

Fed. R. Civ. P. 62(c) provides, in relevant part,

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Section 1 of the Norris-LaGuardia Act provides that "[n]o court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute . . ." 29 U.S.C. § 101.

On September 24, 1987 the Honorable Charles A. Legge, United States District Judge for the Northern District of California, issued a preliminary injunction staying the arbitration proceedings in this case. That preliminary injunction is currently on appeal to the United States Court of Appeals for the Ninth Circuit.

Defendants opposed the granting of a preliminary injunction by arguing that it constituted a violation of the Norris-LaGuardia Act. Judge Legge rejected that argument, and this issue is currently on appeal. Judge Legge also found that the balance of hardships weighed in favor of granting plaintiff injunctive relief. This court will follow Judge Legge's determination and stay arbitration in this matter pending the appeal of this issue. Plaintiff's request for a stay of enforcement pending appeal in this matter is granted.

In accordance with the foregoing, the court orders that:

(1) plaintiff's motion for reconsideration is denied; and

(2) plaintiff's motion for a stay of enforcement of the judgment in this matter pending appeal is granted.

Dated: July 18, 1988

/s/ Samuel Conti
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 87-3733 SC

CAMPING CONSTRUCTION COMPANY,
a California corporation,
Plaintiff,

—vs—

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, an unincorporated association and IRON WORKERS LOCAL UNION No. 378, an unincorporated association,
Defendants.

ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

[Filed Apr. 22, 1988]

Plaintiff Camping Construction Company (referred to as the "Employer") brings this action against defendants seeking an injunction to stay arbitration and declaratory relief. On September 24, 1987, the Honorable Charles A. Legge, United States District Judge for the Northern District of California, issued a preliminary injunction staying the arbitration proceedings in this case. That preliminary injunction is currently on appeal to the United States Court of Appeals for the Ninth Circuit. The matter is presently before the court on plaintiff's and defendants' cross-motions for summary judgment.

The Employer is a California corporation engaged in the business of the construction of mini storage facilities. The Employer's offices are located in Oakland, California.

The arbitration proceedings at issue in this litigation concern two grievances filed against the Employer by defendant Iron Workers Union Local No. 378 (referred to as the "Local"). The Employer claims it is not a signatory to a collective agreement with defendant District Council of Iron Workers of the State of California and Vicinity (referred to as the "District Council") or any of its local affiliates unions including the Local.

The Employer moves this court for summary judgment in its favor. The Employer claims the only agreement it had with the District Council was a prehire agreement executed in October of 1978, which never matured into a fully enforceable collective bargaining contract because the District Council at no time achieved majority status among the Employer's employees. The Employer also claims that its conduct at the initial signing of the agreement, and subsequent to it, evidenced an intent to repudiate any obligation under the agreement. The Employer also argues, in the alternative, that the District Council repudiated the agreement by letter in 1980, giving its notice of its desire to modify the agreement.

Defendants oppose the Employer's motion, and cross-move for summary judgment. Defendants argue that it is undisputed that plaintiff signed an agreement with defendants; they maintain that under the terms of that agreement this dispute should be arbitrated. Defendants argue that the agreement contains a broad arbitration clause, and that the issue of whether the agreement has expired or terminated is for an arbitrator to decide. Defendants further argue that should the agreement be interpreted as a prehire agreement, this court is without jurisdiction to decide whether the Employer repudiated it.

Summary judgment is proper only when there is no genuine issue of material fact or when, viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of

law. Fed. R. Civ. P. 56(c); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. ——, 91 L.E.2d 265 (1986). In addition, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issue that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986). If the factual context make the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment. *California Architectural Building, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

It is undisputed that both plaintiff and defendants executed an agreement in 1978 whose terms bound the parties to the 1977-1980 master agreement of the District Council. Section 28 of the master agreement at issue in this case contains a grievance and arbitration procedure which provides, in pertinent part

> Boards of Adjustment shall be created for the settlement of disputes, except jurisdictional disputes, which shall be composed of two (2) representatives selected by the Union and two (2) representatives selected by the Employers . . . Said *Board shall have the power to adjust any differences that may arise regarding the meaning and enforcement of this Agreement.*

Declaration of Richard Zampa in Support of Defendants' Motion for Summary Judgment, Exhibit E, pp. 69-70 (emphasis added).

The Ninth Circuit has recently held that where the collective bargaining agreement contains a broad arbitration clause, the question whether a particular act or failure to act effectively serves to terminate the agreement is to be resolved by an arbitrator. *Brotherhood of Teamsters and Auto Truck Drivers Local #70 v. Interstate Distributor Company*, 832 F.2d 507, 511 (9th Cir. 1987). The court finds the arbitration clause at issue in this case is broad, excluding only jurisdictional disputes. Under the rule set forth in *Interstate, supra*, the question of whether plaintiff is obligated under the provisions of the master agreement is an issue for the arbitrator.

Plaintiff seeks to avoid arbitration by arguing the agreement it signed was a prehire agreement. Prehire agreements are specially recognized collective bargaining agreements in the construction industry. These agreements provide an exception to the general rule that an employer may not bargain with unions that do not enjoy the support of the majority of workers in the bargaining unit. *See* 29 U.S.C. § 158(f). The Ninth Circuit has issued decisions, prior to their decision in *Interstate*, which created an exception to the rule described in *Interstate*. Those decisions permitted a district court to decide in the first instance whether an employer has effectively repudiated a prehire agreement. *See Mesa Verde Construction v. Northern California District Council of Laborers*, 820 F.2d 1006 (9th Cir. 1987), *reh'g en banc granted, prior opinion withdrawn*, 832 F.2d 1164 (1987); *Ion Construction Co. v. District Council of Painters No. 16*, 803 F.2d 1050 (9th Cir. 1986).

The court finds that the instant dispute is governed by the *Interstate* decision. Prior inconsistent decisions of the Ninth Circuit do not control. Whether or not plaintiff

is bound by the terms of the master agreement is a question which must be arbitrated. The court therefore denies plaintiff's motion for summary judgment, and grants summary judgment in favor of defendants.

In accordance with the foregoing, the court orders that:

(1) plaintiff's motion for summary judgment is denied; and

(2) defendants' motion for summary judgment is granted.

Dated: April 22, 1988

/s/ Samuel Conti
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 87-3733 SC

CAMPING CONSTRUCTION COMPANY,
a California corporation,
Plaintiff,

—VS—

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, an unincorporated association and IRON WORKERS LOCAL UNION NO. 378, an unincorporated association,
Defendants.

PRELIMINARY INJUNCTION
STAYING ARBITRATION

[Filed Sep. 24, 1987]

This cause came on for hearing on September 22, 1987, on Plaintiff's motion for a Temporary Restraining Order to Stay Arbitration. By stipulation, the parties agreed to have this Order take the form of a Preliminary Injunction.

The Court having considered written and oral arguments supplemented by sworn declarations and other evidence finds sufficient cause to grant a Preliminary Injunction staying the arbitration.

A determination of Plaintiff's obligation to arbitrate is within the jurisdiction of this Court, not for the arbitrator to decide. Plaintiff has submitted sufficient evi-

dence and the Court finds a sufficient probability that Plaintiff will succeed on the merits. If this injunction is not granted, there is a substantial likelihood that Plaintiff would suffer irreparable harm if the arbitration were to proceed. Alternatively, the Court finds that Plaintiff has demonstrated that there is a serious legal question as to the merits of this case which can best be resolved through litigation. In addition, the balance of the hardship, should the arbitration proceed absent a stay, would tip towards the Plaintiff.

Accordingly, and for good cause appearing, it is hereby ordered that the arbitration of the matters involving the parties herein, now pending to be heard pursuant to the grievance arbitration mechanism established by the District Council of Ironworkers for the State of California and Vicinity Master Agreement, shall be, and hereby is, stayed pending a final disposition of the matter currently pending before this Court.

IT IS SO ORDERED.

Dated: Sep. 24, 1987.

/s/ Charles A. Legge
United States District Court
Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 87-3733 SC

CAMPING CONSTRUCTION COMPANY,
a California corporation,
Plaintiff,

—VS—

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, an unincorporated association and IRON WORKERS LOCAL UNION NO. 378, an unincorporated association,
Defendants.

Dated: September 22, 1987
Time: 3:00 p.m.

(PROPOSED) FINDINGS OF FACT; CONCLUSIONS OF LAW

[Filed Oct. 6, 1987]

This matter came to be heard on the complaint of Plaintiff, Camping Construction Company for a Preliminary Injunction pursuant to Section 301 of the Labor Management Relations Act (29 U.S.C. § 185), pending final disposition of the action before the Court. A hearing was duly held and all parties were afforded full opportunity to present argument on the evidence and law in the case. The Court having fully considered the com-

plaint, answer, declarations, exhibits, memoranda, arguments of counsel and the entire record in this matter make the following findings:

I.

FINDINGS OF FACTS

1. Plaintiff Camping Construction Company is a California corporation with offices located in Oakland, California engaged in the construction of storage facilities. During the preceding twelve month period, Plaintiff purchased and received goods valued in excess of $50,000 manufactured and shipped directly from points located into the State of California

2. Defendant District Council of Iron Workers of the State of California and Vicinity is a labor organization whose membership consists of various affiliated local unions in Northern California and maintains its principal office in the City of Burlingame, County of San Mateo, State of California.

3. Defendant Iron Workers Union Local No. 378 is a labor organization comprised of individual union members. Defendant Iron Workers Union Local No. 378 is an affiliate of Defendant Iron Workers District Council of the State of California and Vicinity and maintains its principle place of business in the City of Oakland, County of Alameda, State of California.

4. Plaintiff Camping Construction Company executed a memorandum agreement with the District Council of Iron Workers of the State of California and Vicinity on or about October 1, 1978.

5. On or about March 10, 1987, Plaintiff Camping Construction Company was notified that Defendant Iron Workers Union Local 378 had filed a grievance alleging Plaintiff violations of Section 5 and Section 2-B of the District Council of Iron Workers of the State of Cali-

fornia and Vicinity Master agreement. The alleged violations were premised upon Iron Workers Union Local No. 378's allegation that Camping Construction Company was "not using members of this association" on its construction projects.

6. On June 4, 1987, the Iron Workers Board of Adjustment met to hear the grievance filed against Camping Construction Company. Camping Construction Company made a special appearance to deny its signatory status and dispute the jurisdiction of the Board of Adjustment. On or about June 26, 1987, Plaintiff Camping Construction Company was notified that Defendant Iron Workers Union Local 378 had filed a second grievance alleging Plaintiff violation of Section 5 of the District Council of Iron Workers of the State of California and Vicinity Master Agreement. The alleged violation were based upon the same alleged violation as the first above-mentioned grievance filed by Defendant against Plaintiff. A continuation of the arbitration was granted by the Adjustment Board. The arbitration was subsequently scheduled for September 24, 1987.

7. Plaintiff has submitted evidence raising substantial questions that the:

(a) Memorandum agreement executed by Plaintiff on October 1, 1978 was a prehire agreement within the meaning of Section 8(f) of the National Labor Relations Act and that the aforesaid prehire agreement was abrogated on or about July 1, 1980;

(b) The memorandum agreement was terminated by its own terms effective June 30, 1980;

(c) Defendants should be estopped from asserting that Plaintiff is bound to a current collective bargaining agreement;

(d) The Board of Adjustment tribunal is biased and its procedures fail to afford Plaintiff the right to counsel.

8. The Court's grant of a Preliminary Injunction Staying the pending arbitration hearing is the appropriate remedy because, absent the stay, Plaintiff will suffer irreparable injury. An adverse judgment by the arbitrator would create liability for Plaintiff Camping Construction Company to Defendants in alleged unpaid wages and fringe benefits. Further, if Plaintiff Camping Construction Company loses at the arbitration hearing, it will be forced not only to appeal the decision, but to engage in duplicative proceedings pursuant to its Complaint for Declaratory Relief. The Court is concerned that the standard of Court review of an arbitration award on the issues presented may be different and require a more deferential standard if the arbitration award is entered against Plaintiff before the declaratory relief issues are considered. The Court recognizes that this injunction will prevent the Board of Adjustment from proceeding and that any relief awarded by the Board in the event of an adverse decision to Plaintiff, including the award of wages and fringe benefits to persons on the union out-of-work list, will be delayed. However, Plaintiff has established a substantial likelihood it will prevail on the merits of the dispute. Also, the balance of hardships is in the Plaintiff's favor since the Defendants' rights and interests remain intact should it ultimately prevail on the merits of the suit.

II.

CONCLUSIONS OF LAW

9. This Court has jurisdiction over this action pursuant to Section 301 of the Labor Manageemnt Relations Act of 1947 (29 U.S.C. § 185) as an action based upon a purported contract between the Employer and a labor organization representing employees in an industry affecting commerce.

10. Plaintiff Camping Construction Company is, and at times material herein, was an employer engaged in an

industry affecting commerce within the meaning of Section 301 of the LMRA [29 U.S.C. § 185 et seq.].

11. Defendant District Council of Iron Workers of the State of California and Vicinity is a voluntary, unincorporated association commonly known and doing business as a labor labor organization within the meaning of Section 2(5) of the National Labor Relations Act, as amended [U.S.C. § 152(5)].

12. Defendant Iron Workers Union Local 378 is a voluntary unincorporated association commonly known and doing business as a labor organization within the meaning of Section 2(5) of the National Labor Relations Act as amended, [29 U.S.C. § 152(5)].

13. The existence of a contract to arbitrate is properly decided by the courts prior to compulsory submission to arbitration. Plaintiff has established probable success on the merits of its claims.

14. Because of the limited opportunity for review of arbitral awards, a strong possibility exists that Plaintiff will suffer irreparable harm if Defendant District Council of Iron Workers of the State of California and Vicinity and Iron Workers Union Local No. 378's grievance is permitted to proceed to hearing at this time.

15. Plaintiff has demonstrated that a serious question as to the merits of this case regarding the existence of validity of an underlying contract with Defendants can be best addressed through litigation.

16. The balance of hardship, should the arbitration proceed, would tip toward the Plaintiff. In the event of an adverse decision from the arbitrators, Plaintiff could incur extensive financial liability pursuant to ruling which is subject to limited judicial review, and would be compelled to expend additional monies in challenging the award in this Court. In contrast, persons on the union out-of-work list who stand to receive wages and fringe

benefit contributions under an arbitration award adverse to Plaintiff will be delayed in receiving those monetary amounts if the Plaintiff and this Court are incorrect.

In light of the foregoing, it is appropriate, just and proper that, pending final disposition of this matter before the Court, the grievance arbitration hearing of Defendant District Council of Iron Workers of the State of California and Vicinity and Defendant Iron Workers Union Local 378 be stayed pending final disposition of this action.

Plaintiff shall post a bond in the amount of $2,500.00.

DATED: ————————, 1987.

APPROVED AS TO FORM

/s/ Sandra Benson 9-30-87
SANDRA BENSON

APPROVED AS TO FORM

/s/ Paul V. Simpson 9-29-87
PAUL V. SIMPSON

DATED: 10/2/87, 1987.

/s/ Charles A. Legge
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 87-3733 SC

CAMPING CONSTRUCTION COMPANY,
a California corporation,
Plaintiff,

—vs—

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, an unincorporated association and IRON WORKERS LOCAL UNION NO. 378, an unincorporated association,
Defendants.

JUDGMENT

[Filed Apr. 22, 1988]

In accordance with the order filed herein, it is hereby adjudged, ordered, and decreed that defendants' motion for summary judgment is granted.

Dated: April 24, 1988

/s/ Samuel Conti
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2767

CAMPING CONSTRUCTION COMPANY
Plaintiff-Appellee

v.

DISTRICT COUNCIL OF IRON WORKERS;
IRON WORKERS LOCAL UNION 378
Defendants-Appellants

No. 88-15169

DC# CV-87-3733-SC

CAMPING CONSTRUCTION COMPANY
Plaintiff-Appellee-
Cross Appellant

v.

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, an unincorporated association, and IRON WORKERS LOCAL UNION NO. 378, an unincorporated association,
Defendants-Appellants-
Cross-Appellees

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

ORDER

[Filed Dec. 11, 1990]

Before: GOODWIN, PREGERSON, and REINHARDT, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX H

SUBCHAPTER IV—LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 158. UNFAIR LABOR PRACTICES

(b) Unfair labor practices by labor organization . . .

* * * *

(f) Agreements covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection

(a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district court of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district

in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The Service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

Supreme Court, U.S.
FILED
APR 10 1991
OFFICE OF THE CLERK

No. 90-1413

In The

Supreme Court of the United States

October Term, 1990

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, AFL-CIO, an unincorporated association, and Iron Workers Local Union No. 378, an unincorporated association,

Petitioners,

v.

CAMPING CONSTRUCTION COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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April 1991

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QUESTIONS PRESENTED

1. DOES THE COURT, RATHER THAN AN ARBITRATOR, HAVE THE OBLIGATION UNDER FEDERAL LABOR LAW AND POLICY TO DETERMINE WHETHER A COLLECTIVE-BARGAINING AGREEMENT ARISING UNDER SECTION 8(f) OF THE NATIONAL LABOR RELATIONS ACT, AND EXECUTED AND REPUDIATED PRIOR TO THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD IN *JOHN R. DEKLEWA & SONS*, 282 N.L.R.B. 1375 (1987) *ENF. SUB. NOM. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 3 V. N.L.R.B.*, 843 F. 2d 70 (3rd CIR.), CERT. DEN. 488 U.S. 889 (1988) HAS BEEN REPUDIATED, OR CONTINUES TO EXIST?

LIST OF PARTIES

1. The names of the parties to this proceeding are those contained in the caption to this case.

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OPINIONS BELOW

The relevant opinions below are set forth at page 2 of Petitioners' Iron Workers Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 90-1413. ("Petition").

JURISDICTION

The relevant jurisdictional history is set forth at Petition, page 2. The Petition was received on March 11, 1991. This opposition is timely filed under 28 U.S.C. § 2101 and Rule 12 of the Court.

STATUTES INVOLVED

The relevant statutory provisions are set forth at Petition, page 3 and Appendix H.

STATEMENT OF THE CASE

On September 16, 1987, Camping Construction Company ("Camping") filed a Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the Northern District of California, invoking the jurisdiction of that Court under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185. The Complaint sought the intervention of the District Court in a dispute over whether the conduct of either Camping or the Unions negated the continued existence of a collective-bargaining agreement and the continued vitality of

the arbitration provisions thereof. Camping contended that if there was no collective-bargaining contract extant between the parties, then *a fortiori* there was no agreement to arbitrate disputes arising out of events occurring subsequent to that contract's demise.

The facts were not in dispute. In 1978 Camping executed a pre-hire memorandum agreement with the Petitioners, District Council of Iron Workers and Iron Workers Local 378. The master agreement to which the memorandum agreement referred contained grievance and arbitration provisions and a termination date of June 30, 1980. The Unions notified Camping of their desire to modify the agreement on February 21, 1980, thus triggering the termination of the collective-bargaining agreement on June 30, 1980, or so Camping contended. Camping, in reliance upon that position, did not comply with the agreement's provisions after June 30, 1980, and believed that its open and notorious failure to do so was known to the Unions, which began to picket Camping at jobsites within their jurisdiction.

Seven years later, however, the Unions sought to invoke the grievance and arbitration provisions of the then current Master Labor Agreement, a collective-bargaining agreement to which Camping had never assented. Grievances filed by the Unions alleging violations of that agreement's provisions were premised upon Camping's failure to have used the Unions' members on Camping's construction projects in 1987, and were scheduled for arbitration before the Board of Adjustment provided for in that Master Labor Agreement.

Since the existence of an agreement to arbitrate disputes is for a court, not an arbitrator, to decide, Camping sought to have the District Court review whether it was bound to arbitrate the asserted grievances of the Unions, and to stay the scheduled arbitration proceedings pending such review.

The District Court, at Camping's request, issued a Preliminary Injunction staying arbitration proceedings pending final disposition of the issue before the Court as to whether Camping was bound to a contract calling for arbitration of disputes. It is the propriety of the issuance of that injunction which is at issue in the Cross Petition for Certiorari being filed by Camping in conjunction with this Opposition.

Although the District Court subsequently granted summary judgment for the Unions – concluding that the question of the collective-bargaining agreement's termination, lawful repudiation, and very existence was for the arbitrator to determine – the U.S. Court of Appeals for the Ninth Circuit partially disagreed. It held (1) the issue as to the "termination" of the agreement was for the arbitrator, (2) the issue as to the lawful repudiation of the Section 8(f) pre-hire collective-bargaining agreement was for the District Court to decide, but (3) the District Court could not issue an order staying arbitration proceedings without full compliance with the provisions of the Norris-LaGuardia Act, 29 U.S.C. §§101-115.

Petitioners have requested certiorari on the second of these three issues, as to whether the court, not an arbitrator should properly decide whether an *otherwise lawful* pre-*Deklewa* repudiation occurred, framed, as an implicit

condition predicate, in terms of a generalized request for review by the Court of the underlying issue of retroactive application of *Deklewa*.

REASONS FOR DENYING THE WRIT

I. THE ISSUE OF *DEKLEWA* RETROACTIVITY IS NOT BEFORE THE COURT IN THIS CASE BUT SHOULD THE COURT DEEM PLENARY REVIEW PROPER SUCH REVIEW SHOULD INCLUDE THE MERITS OF THE ADOPTION OF AND DEFERRAL BY THE COURT TO THE BOARD'S "LAW CHANGING" DECISION IN THAT CASE

Petitioners raise no real issue that may be determined by the Court without revisiting either the no-retroactivity rule of *Mesa Verde*[1] and the substantive validity of the decision of the National Labor Relations Board in *Deklewa*.[2] Prior to *Deklewa*, the Board, the Circuits and the Court all considered repudiation an integral characteristic of section 8(f) agreements. Absent *Deklewa*, it is plain that repudiation rights are not grievable because no arbitration obligations can arise from a contract that does not exist. The Board's construction of the Act, adopted by the

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[1] *Mesa Verde Construction v. Northern California District Counsel of Laborers*, 885 F.2d 594 (9th Cir.), *cert. den.*, ___ U.S. ___, 59 U.S.L.W. 3250 (1990).

[2] *John R. Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enf. sub. nom. International Association of Bridge Structural & Ornamental Ironworkers, Local 3 v. N.L.R.B.*, 843 F.2d 70 (3d Cir. 1988), cert. den. 488 U.S. 889 (1988).

Court in *McNeff*[3] and the Ninth Circuit in *Ion Construction*,[4] and affirmed in *Interstate Distributor Co.*[5] and *Camping*, gives no hint of any controversy whatsoever on *this* issue.

The decision below simply confirms that since pre-*Deklewa* repudiations under 8(f) agreements are not grievable, the Court retains primary jurisdiction to determine whether repudiation has occurred. Factually it is no different from that presented in *Mesa Verde* save that the issue of repudiation has not yet been decided by a District Court. The issues of retroactivity were fully briefed in *Mesa Verde* and Petitioners' brief herein adds no new arguments.[6] *Deklewa* retroactivity is simply not before the Court in this case, and for that reason is not ripe for decision. Should the Court deem plenary review justified, Camping respectfully requests that the Court exercise the same discretion with respect to the Questions Presented in the Cross-Petition previously filed in *Mesa Verde*, on the merits of the adoption of and deferral by the Court to the Board's "law changing" decision in *Deklewa*.[7]

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[3] *Jim McNeff v. Todd*, 461 U.S. 260, 103 S. Ct. 1753 (1983).

[4] *Ion Construction v. District Council of Painters No. 16*, 803 F.2d 1050 (9th Cir. 1986).

[5] *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distributor Co.*, 832 F.2d 507 (9th Cir. 1987)

[6] A copy of the Response filed by Mesa Verde on the issue of retroactivity is attached herein as Appendix "A" for the convenience of the Court in assessing the underlying merits of Petitioners' request for plenary review.

[7] For the convenience of the Court, the Cross Petition in *Mesa Verde Construction Co. v. Northern California District Council of Laborers, et al.*, Case No. 89-1874 is reproduced at Appendix "B".

II. NO CONFLICT EXISTS WITH THE PRIOR DECISIONS OF THE COURT ON THE ISSUE OF ARBITRABILITY OF DISPUTES

Similarly, no substantive conflict exists with respect to the presumption in favor of arbitrability of contractual disputes. That presumption, which has its genesis in the willing agreement of contracting parties, depends on the statutory framework that governs their substantive conduct. In purporting to rely on that presumption, Petitioner is simply missing – or obscuring – the point. Rights arising under federal enactments, whether it be federal antitrust doctrine,[8] securities law[9] or federal labor law, are specific to those enactments and their own unique policy considerations. The scope of any presumption as to the "arbitrability" of statutory rights is for Congress and the Court to determine. The issue is not whether as a generalized proposition, because they are of statutory origin, rights so created are, *a fortiori*, not arbitrable, but whether the particular statutory right of repudiation is consistent with the statutory scheme set forth in section 8(f) of the National Labor Relations Act.[10]

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[8] See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[9] *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

[10] 29 U.S.C. 158 (f). The independent non-arbitrable character of a section 8(f) repudiation is not premised on the inviolability of the labor agreement or any supposed generalized immunity from arbitration. To the contrary, the Court has, in cases ranging from the *Steelworkers Trilogy* (*Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v.*

(Continued on following page)

The substantive issues of uniform application of federal statutory law advanced by Petitioner simply do not arise and no certworthy issue is presented. The myth of immortality vested in the right of repudiation by Petitioner by virtue of the automatic renewal of construction industry collective-bargaining agreements does not coincide with the harder realities of the Ninth Circuit's decision in *Mesa Verde*, which forecloses the possibility of reasonable reliance on the right to repudiate in either Board doctrine or Ninth Circuit law. Indeed, if repudiation does have continued viability after *Mesa Verde*, it can only exist if the Court chooses to revisit that decision on the merits.

(Continued from previous page)

Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)) to *AT&T Technologies* (*AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986), acknowledged the traditional role of arbitration in the processing of grievances arising under labor agreements. Issues of contract formation, termination and, especially, repudiation are quite another matter. The abuse of discretion lies in the unfounded belief that repudiation is grievable in the first instance, not in the rectification of that error by a district court. *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 598 F.Supp. 1092 (N.D. Cal. 1984)

CONCLUSION

For all the foregoing reasons, Camping respectfully submits that this Petition for Writ of Certiorari should be denied. However, should the Court believe that the issues warrant plenary review, Camping respectfully urges the Court to grant the Cross-Petition for Writ of Certiorari filed herewith.

Respectfully submitted,

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April 1991

APPENDIX A

No. 89-1661

In The

Supreme Court of the United States

October Term, 1989

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AND CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,

Petitioners,

v.

MESA VERDE CONSTRUCTION CO.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit after remand from the *en banc* Court (Pet. App. A) is reported at 885 F.2d 594. The Opinion of the *en banc* Court (Pet. App. B) filed November 15, 1988 is reported at 861 F.2d 1124. The Opinion of the original three-judge panel of the United States Court of Appeals for the Ninth Circuit (Pet. App. C) filed June 23, 1987 is reported at 820 F.2d 1006. The Decision of the United States District Court for the

Northern District of California (Pet. App. D) filed December 13, 1984 is reported at 598 F. Supp. 1092. The Order of the United States District Court for the Northern District of California denying the Motion for Alteration, Amendment or Vacation of Order (Pet. App. E) filed February 11, 1985 is reported at 602 F. Supp. 327.

JURISDICTION

The Judgment and Opinion of the original three-judge panel of the United States Court of Appeals for the Ninth Circuit was entered on June 23, 1987. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was filed and granted. The Decision of the *en banc* Court reversing the earlier Opinion and remanding the case to the three-judge panel to determine the question of retroactivity was filed on November 15, 1988. The Decision of the three-judge panel after remand was filed on September 13, 1989. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was filed on September 27, 1989. On January 26, 1990, the Petition for Rehearing was denied, and the Suggestion for Rehearing *en banc* was rejected, and the Order of the three-judge panel was amended.

The jurisdiction of the Court has been invoked under 28 U.S.C. § 1254(1). The Petition was timely filed with the Court under 28 U.S.C. § 2101(c), and this Response is filed pursuant to the Request of the Court.

STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, Section 8(f), 29 U.S.C. § 158(f).

B. Labor-Management Relations Act of 1947, as amended, Section 301, 29 U.S.C. § 185.

Pertinent portions of these statutory provisions are reproduced at Pet. App. F.

STATEMENT OF THE CASE

The Northern California District Council of Laborers ("Laborers") and the Carpenters 46 Northern California Counties Conference Board ("Carpenters") are labor organizations within the meaning of the National Labor Relations Act of 1947, as amended (hereinafter "NLRA"), 29 U.S.C. § 152(d). Mesa Verde Construction Company ("Mesa Verde") is an employer primarily engaged in the construction industry within the meaning of § 8(f) of the NLRA, 29 U.S.C. § 158(f).

In 1979, Mesa Verde entered into its first collective bargaining agreement with the Laborers, and signed an additional collective bargaining agreement with the Laborers on June 26, 1980. On November 17, 1982, Mesa Verde and the Laborers agreed in writing that their 1980 contract would continue in effect until June 15, 1986.

Mesa Verde first entered into a collective bargaining agreement with the Carpenters in August, 1979. Through a subsequent agreement executed in June, 1980, Mesa

Verde accepted the new June 16, 1980 to June 15, 1983 Carpenters Master Agreement. On September 8, 1982, Mesa Verde and the Carpenters entered into an early extension of the agreement to June 15, 1986.

Despite the fact that the agreements with both unions were to remain in effect until June 15, 1986, Mesa Verde, by way of letters, informed the Unions of its intent to abrogate or repudiate its collective bargaining agreements in May of 1984. At the time, Mesa Verde was working on a project in Hercules, California, at which it employed members of both Unions.

In late May or early June of 1984, Mesa Verde began work on *another* project employing non-union workers.

Both unions filed grievances against Mesa Verde and requested arbitration over Mesa Verde's contractual obligations on the *new* project. Mesa Verde brought suit under Section 301 of the LMRA, 29 U.S.C. § 185, against both Unions seeking a declaratory judgment that it need not comply with the Agreements with respect to projects begun after its repudiation of the Agreements. The District Court stayed the arbitrations pending resolution of the declaratory judgment action and later granted Mesa Verde summary judgment against both Unions.

The District Court concluded that Mesa Verde was a "project by project" employer, and that neither Union had "majority" support in the relevant units, *i.e.* the new projects. The Court held that the collective bargaining agreements at issue were "pre-hire" agreements authorized by § 8(f) of the NLRA and that Mesa Verde's May, 1984 letters were sufficient to repudiate the Agreements.

REASONS FOR DENYING THE WRIT

Summary of Argument

Although the issues underlying Petitioner's argument are important in the administration of the day-to-day relationships between construction unions and construction employers, those issues are not of such importance as to warrant the review of the Court.

The decision of the court below correctly analyzed whether the "law-changing" decision of the National Labor Relations Board ("NLRB") should be applied retroactively to the factual situation present in this case. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). Its decision rested upon settled principles of law.

Although "the general rule of long-standing is that the law announced in [a] Court's decision controls the case at bar," see *e.g., St. Francis College v. Al-Khazraji*, 481 U.S. 604, 608, 107 S.Ct. 2022, 2025 (1987), the Court has recognized that this general rule is subject to exception where, *inter alia*, substantial inequitable results would occur. See, *e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971).

Mesa Verde recognizes that among the members of the Court, there may be differences of opinion as to the continued viability of the Court's civil retroactivity doctrine, *e.g., American Trucking Associations, Inc., et al. v. Smith*, 495 U.S. ___, ___ S.Ct. ___ (June 4, 1990), but respectfully suggests that under the reasoning of either the plurality or dissent in that case, the outcome of this case would be the same. Hence, review of the "retroactivity" issues presented by Petitioner is unnecessary.

In its attempt to convince the Court otherwise, Petitioner has mischaracterized certain facts, and overemphasized the impact of the decision of the court below. It does not create the parade of horribles that Petitioner has suggested.

Finally, this case *does not* present a situation where there is a clear conflict among the Circuits on the precise issues presented.

ARGUMENT

A. The Court Below Correctly Concluded That Retroactive Application Of The NLRB's "Law-Changing" Decision in *John R. Deklewa & Sons, Inc.* To The Parties In This Case Was Unwarranted.

The *Chevron Oil v. Huson* test to determine whether a decision should *not* be given retroactive effect – a test which apparently still commands support of the plurality of the Court – has three parts, which may be summarized as follows:

1. whether the "law-changing" decision is one of first impression, or overrules clear past precedent;
2. whether retrospective operation of the law-changing decision would further or retard the operation of the rule in question;
3. whether retrospective application of the rule will impose substantial inequitable results.

Application of these three factors to the situation here reveals the correctness of the decision of the court below.

First, the "repudiation" rule applicable to Section 8(f) pre-hire contracts, previously grounded in NLRB precedents, see *e.g., D'Angelo & Kahn, Inc.*, 248 NLRB 396 (1980), was clearly overruled by the NLRB in *John R. Deklewa & Sons, Inc.*, 282 NLRB No. 184 (1987). The Ninth Circuit, which itself had previously adopted the "repudiation" rule as the law in its Circuit, see *e.g., United Bhd. of Carpenters & Joiners Local 2247 v. Endicott Enters.*, 806 F.2d 918 (9th Cir. 1986), clearly "overruled" its own past precedents on this subject in its *en banc* decision below.

The pre-*Deklewa* law concerning a party's *ability* to repudiate a pre-hire agreement during its term was abundantly clear, even if the law as to all of the types of *methods* to accomplish it was not. The "law-changing" decision involved here – either the NLRB's decision, or that of the Ninth Circuit's *en banc* panel – overturned the clear past precedent as to the employer's *ability* to repudiate such agreements. Under the NLRB's holding in *Deklewa*, neither a union nor an employer has the *ability* to lawfully repudiate a pre-hire agreement during its unexpired term; the question of the proper *method* to accomplish such a repudiation has become irrelevant.

Second, retrospective operation of the new "non-repudiation" rule endorsed by the majority of the *en banc* Court below would not further "employee free choice" or "labor relations stability". The practical effect of retroactivity of the new "non-repudiation" rule of the NLRB and Ninth Circuit would be to judicially impose a collective-bargaining representative upon the "non-union" workers employed by Mesa Verde on the projects at issue (Pet. p.

4), thereby currently depriving them of any free choice as to a bargaining representative, and depriving them of the ability they may have had six years ago to renounce the Union as their representative through an NLRB election.

Moreover, contrary to Petitioner's suggestions (Pet. p. 7), "labor relations stability" is fostered, not retarded, when the parties to a collective-bargaining relationship – even one legitimated by Section 8(f) of the Act – enter into and live by the rules of such a relationship knowing their respective rights and obligations. Here, both the Unions and the Employer must be held to have known when they entered into their original relationship and subsequently lived by it that the pre-hire agreements were voluntary and voidable by either party. The Unions could not expect that such agreements were enforceable unless they became the majority bargaining representative at each new jobsite, *Dee Cee Floor Covering*, 232 NLRB 421 (1977), and the Employer must be held to have known that as long as the Union had "majority status", the Employer would not be permitted to ignore the agreement or the economic consequences of its voluntary execution. *NLRB v. Pacific Erectors, Inc.*, 718 F.2d 1459 (9th Cir. 1983).

Petitioner's stated fears of forum-shopping (Pet. p. 11) should not persuade the Court that a prospective application of the new rules will retard their operation. The issue is not whether the NLRB and the courts have different rules *today* for the parties to collective-bargaining relationships. Rather, the issue is whether a termination of the relationship, accomplished in full accord with the law at the time of the operative conduct, is to be

penalized by retroactive adoption of a new rule outlawing such termination. Nothing in the law would have prevented the Unions here from challenging Mesa Verde's repudiation of the collective-bargaining agreements in appropriate charges made to the NLRB in 1984 at the time of the operative conduct, or would have prevented the Unions from arguing to the NLRB that on the facts or the law, Mesa Verde had unlawfully terminated the collective-bargaining relationship. The Unions simply chose not to do so, and now complain that their failure to have done so should be remedied by retroactive application of rules which did not exist at the time. Petitioner's "forum shopping" fears are illusory ones, for all cases involving repudiation conduct after the date of the *Deklewa* decision will be governed by it, and only a few old situations will be governed by the prior rules.

As to the third prong of the *Chevron Oil* test – whether retrospective application of the rule will impose substantial inequitable results – the reliance interests of the parties clearly suggest that Mesa Verde, and other employers, who relied upon the fundamental principles of law developed under Section 8(f) and Section 8(a)(5) of the Act would be unfairly treated by retroactive application of a rule which not only changes their economic and administrative expectations, but also the length and character of their relationship with the Unions involved.

Here, the "grievances" of the Laborers and Carpenters deal with alleged violations of the collective-bargaining agreement which occurred *after*, not before, the repudiation of the agreement by Mesa Verde (Pet. App. 64a). The undisputed facts reveal that the Unions were not the freely-chosen majority bargaining representative

of the employees working at the construction projects begun *after* the May 8 and May 15 repudiations of the Carpenters and Laborers Agreements. (Pet. App. 84a, 100a)

The economic and administrative consequences of retroactive application of the new non-repudiation rule would be to impose upon Mesa Verde the financial burdens of labor costs not expected as to those projects, as well as the necessity to deal with the Unions as to all the "wages, hours and other terms and conditions of employment" of Mesa Verde's employees notwithstanding the "non-majority" status of those Unions. Retroactive application would likewise impose contractual arbitration clauses. A *voluntary* method of settling disputes – favored by the Court for precisely this reason – would become, with adroit judicial prestidigitation, *involuntary*.

This case was carried to judgment in the District Court on the basis of settled principles of law. Mesa Verde premised its repudiation conduct on rights grounded in applicable NLRB and Ninth Circuit precedent, see *Dee Cee Floor Covering, Inc., supra; NLRB v. Pacific Erectors, Inc., supra*. The case was litigated with the understanding of all concerned that the operative principles governing the parties conduct were clear.

The Court has recognized that the lower courts, when considering whether a "law-changing" decision should be applied retroactively, should look at the harsh and disruptive effects upon the litigants, and should be guided by the following principles: if the operative *conduct or events* occurred before the "law-changing" decision, a court should apply the law prevailing at the time

of the conduct; otherwise, the court should apply the new law. *American Trucking Associations, Inc. v. Smith, supra,* 495 U.S. at ___. Recognizing the reliance interests of the parties, that is what the Ninth Circuit has done in this case.

Mesa Verde's repudiation of the Laborers and Carpenters agreements occurred almost three years before the "law-changing" decision of the NLRB in *Deklewa.* Therefore, it was proper for the Ninth Circuit to affirm the District Court's entry of judgment which had applied the prior law to the conduct which occurred prior to the "law-changing" decision. This position is consistent with the Court's precedents in similar circumstances. See, *e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 88, 102 S.Ct. 2858 (1982) ("law-changing" decision not applied retroactively when to do so would have upset judgment entered prior to "law-changing" decision).

In sum, since the Ninth Circuit correctly evaluated the application of the *Chevron Oil* factors to this case, there is no overriding warrant for the Court to exercise its supervisory power and review the Ninth Circuit's analysis of the retroactivity issue.

B. There Is No Conflict In The Courts Of Appeals Which Warrants Resolution By The Court At This Time.

Petitioner suggests that the Ninth Circuit and the Third, Eighth and Seventh Circuits are in conflict as to whether the NLRB's decision in *Deklewa* should be applied retroactively. Although it is true that the Third, Eighth, and Seventh Circuits have seen fit to defer to the

NLRB's conclusion that the new non-repudiation rules should apply retroactively to pending NLRB cases, see, *Ironworkers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988); *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir. 1989); *NLRB v. Bufco Corp.*, ___ F.2d ___ (7th Cir. 1990), no Circuit Court is in conflict with the Ninth Circuit on the application of such a rule in cases arising under Section 301 of the LMRA, 29 U.S.C. § 185.

Whatever may be said of the correctness of the non-repudiation rule adopted by the NLRB in *Deklewa*, the "law changing" decision of the NLRB was premised upon administrative convenience to overcome the NLRB's perceptions of the evidentiary problems in litigation of unfair labor practices. The NLRB's unfair labor practice decisions do not always formulate the rules for the enforcement of collective-bargaining agreements under Section 301. Indeed, that dichotomy was foreseen by the Court in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S.Ct. 1753 (1983). There, the Court concluded that although a Section 8(f) pre-hire agreement may form the basis of a breach of contract claim under Section 301 even if the Union does not represent a "majority" of the employees in the relevant unit, such a contract does not obligate the employer to "bargain" with the Union under penalty of an unfair labor practice. *Jim McNeff, Inc. v. Todd, supra; John R. Deklewa and Sons, Inc., supra.*

It would not be improper to have as a matter of federal labor policy a divergence in the law under different Sections of the Labor Act concerning the enforceability of pre-hire agreements. Since the unfair labor practice Sections of the Act, and Section 301 serve different purposes, *Jim McNeff, Inc. v. Todd, supra,* it is not necessary for the Court to fashion rules so as to create

identical results under them. Given such, it is not necessary for the Court to review the "retroactivity" analysis of the Ninth Circuit here simply to attempt to square the results in the two different lines of cases – unfair labor practices cases, and Section 301 breach of contract cases.

C. Even If The Court's Civil Retroactivity Doctrine Were To Be Applied Simply As A Remedial One, The Equitable Balance In This Case Tilts In Favor Of Upholding The Decision Below.

One of the functions of the Court is to construe statutes, determining the meaning of them as Congress intended. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984). Although in reviewing an administrative agency's interpretation of the statute it is charged with enforcing, the Court may apply a deferential test of "reasonableness", the judiciary still is obligated to and does exercise its function with an eye on what Congress intended to be the law governing the rights and obligations of the parties regulated by those statutes. *Id.*

As Mesa Verde has set forth in its Cross-Petition For Writ of Certiorari, No. 89-1874, the Ninth Circuit's *en banc* decision here gave almost blind deference to an administrative agency which changed its mind about what rules were "workable" and about the proper Congressional intent behind two interrelated Sections of the Labor Act. Contrary to the Ninth Circuit, the question before it in this case was not whether the Court's decision in *McNeff* can be read as supporting the Board's decision in *Deklewa*, but rather whether the Labor Act's provisions themselves can support *Deklewa*. As Justice Scalia has

stated: "We defer to agencies, however (and thus apply a mere "reasonableness" standard of review) in their construction of their statutes, not of our opinions." *NLRB v. IBEW, Local 340*, ___ U.S. ___, 107 S.Ct. 2002, 2015 (1987) (Scalia, J., dissenting).

Even so, the extent that both the NLRB and the Ninth Circuit have appropriately changed the law in their respective jurisdictions so that now Mesa Verde's lawful repudiation of its pre-hire agreement would be unlawful, the question remains as to the remedy. If the dissent's view in *American Trucking Associations, Inc. v. Smith, supra*, is applied here, this new rule would be applied retroactively to the facts of this case, leaving it to the lower courts to determine the remedy to be enjoyed by the Unions. Here the suit was one for declaratory, not monetary, relief, so that a limitation on the scope of recovery would be inappropriate.

However, the reliance interests of the parties suggest that the Unions are entitled to no relief. The parties' relationship was governed by the applicable NLRB precedent, applicable Circuit Court precedent and the Court's decisions. The conduct of Mesa Verde in repudiating its Agreements with the Laborers and Carpenters was premised upon the intent of Congress that pre-hire agreements were to be "voluntary", *Jim McNeff, Inc. v. Todd, supra*, and the practical realities that minority Unions in the construction industry were treated differently by Congress when it enacted Section 8(f) in 1959. *Id.*

Principles of equity eschew reliance on rigid application of technical rules, and it is precisely for this reason

that the Court adopted its *Chevron Oil* retroactivity doctrine. Mesa Verde relied upon the law as it existed in 1984 to repudiate its contracts. The Unions chose not to challenge such conduct as an unfair labor practice, but chose to litigate the matter to judgment under that law. It seems unquestionable that the conduct of Mesa Verde, once lawful, cannot be made unlawful by changes in the law it had no hand in shaping, changes it could not have foreseen in light of the Court's decision in *McNeff*.

The Ninth Circuit correctly rejected rigid adherence to the new rule, and balanced the equities concluding that the Unions here were entitled to no relief, albeit doing so by application of the civil retroactivity principles of *Chevron Oil*. That equitable balancing in the form of viewing the matter as one of remedy results in the same conclusion.

Hence, assuming *arguendo* the correctness of the Ninth Circuit's deference to the NLRB and its adoption of *Deklewa* as the law of that Circuit, the outcome of this matter should have been, and should be that the Unions are not entitled to enforce the repudiated pre-hire agreement.

D. Should The Court Grant Review Of The Ninth Circuit's Retroactivity Decision, The Court Should Also Review The Underlying "Law-changing" Decision On Its Merits.

Although the retroactivity issues presented by Petitioner do not warrant review by the Court, Mesa Verde respectfully suggests that the Ninth Circuit has erred in not following the Court's decision in *Jim McNeff, Inc. v.*

Todd, supra. There, the Court clearly stated that Section 8(f) pre-hire agreements were voidable and capable of unilateral repudiation until the Union achieved majority status in the relevant unit, but were fully enforceable under Section 301 of the LMRA, 29 U.S.C. § 185, absent such repudiation. That the NLRB, an administrative agency, has concluded that such a rule is now "unworkable", or that the Ninth Circuit shares such a view, is no excuse for either to ignore the applicable precedent of the Court. As the Court stated only recently: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas, et al. v. Shearson/American Express, Inc.*, 490 U.S. ___, ___, 109 S.Ct. 1917, 1922 (1989).

The Court of Appeals below did not respect that admonition, which clearly was applicable here. It is for this reason that Mesa Verde has sought the Court's plenary review of the entire Section 8(f) – Section 8(a)(5) ruling of the NLRB in *Deklewa*. See, Cross-Petition for Writ of Certiorari, in No. 89-1874. Unless the Court either "overrules" its *McNeff* decision, or "overrules" the Ninth Circuit *en banc* decision here, litigants can not know whether their conduct past or future will expose them to Sec. 301 liability.

Mesa Verde suggests that the Court's decision in *McNeff* rested upon sound reasoning, and carefully balanced union-employer-employee rights in the construction industry. Respect for the principles of *stare decisis* suggests that the Court should not tamper with the rules

formulated in *McNeff*. Such principles also suggest that the Ninth Circuit's deferential adoption of the non-repudiation rule of *Dekleuva* was unsound and contrary to law.

CONCLUSION

For all the foregoing reasons, Mesa Verde respectfully submits that this Petition for Writ of Certiorari should be denied.

However, should the Court believe that the issues herein warrant plenary review, Mesa Verde respectfully urges the Court to grant the Cross-Petition for Writ of Certiorari in No. 89-1784, and review the underlying questions of the correctness of the Ninth Circuit's *en banc* "law-changing" decision.

Respectfully submitted,

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July 1990

APPENDIX B

No. _____

In The

Supreme Court of the United States

October Term, 1989

MESA VERDE CONSTRUCTION CO.,

v. *Cross-Petitioner,*

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AND CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mesa Verde Construction Company ("Mesa Verde") petitions for a Writ of Certiorari to review the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 26, 1990.

OPINIONS BELOW

The relevant opinions below are set forth at page 2 of Petitioners' Laborers' and Carpenters' Petition for a Writ

of Certiorari to the United States Court of Appeals for the Ninth Circuit in the connected case of Northern California District Council of Laborers, and Carpenters 46 Northern California Counties Conference Board v. Mesa Verde Construction Co., No. 89-1661 ("Petition") and Appendices A-E thereto.

JURISDICTION

The relevant jurisdictional history is set forth at Petition, page 2. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The Petition was received on April 30, 1990. This Cross-petition is timely filed under 28 U.S.C. § 2101 and Rule 12.3 of the Court.

STATUTES INVOLVED

The relevant statutory provisions are set forth at Petition, page 2 and Appendix F, with the addition, herein and at Appendix A, of the following:

A. National Labor Relations Act, *as amended*, section(s) 8(a)(5); 8(b)(3); 8(b)(7)(C); 9(a) and 10(b) [29 U.S.C. §§ 158(a)(5); (b)(3); (b)(7)(C); § 159(a) and § 160(b)]

STATEMENT OF THE CASE

The factual statement of this case is fairly set forth in the Petition for Certiorari and in the opinion below.

REASONS FOR GRANTING THE WRIT

More important than the issues of labor law presented by the instant case, the question raised below is

the responsibility of the National Labor Relations Board to follow the decisions and statutory interpretations of the United States Supreme Court, and the role of federal appellate courts in deferring to the NLRB in cases of conflict between the Supreme Court and the NLRB's current opinion. The Courts of Appeal for the Ninth, Third, Seventh and Eighth Circuits[1] have abandoned the traditional balance between the judiciary and the courts by adopting a decision of an administrative agency that purports to overrule Supreme Court precedent and clear statutory construction in the name of administrative convenience. Judge Kozinski, writing in dissent in *Mesa Verde*, en banc, ends his analysis by noting "I can only hope that the Court will have occasion for sober reflection on the wisdom of the approach taken by our court today and by the Third Circuit in *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 222, 102 L.Ed.2d 213 (1988)." The elegiac elegance of Judge Kozinski's plea merits just such consideration by the Court, and, accordingly, it is on those terms that prayer for plenary relief is made.

The Cross-Petition For Certiorari Should Be Granted Because The Decision Of The Court Of Appeals For The Ninth Circuit Directly Conflicts With The Holding And Opinion Of The Court.

In 1977, General Counsel for the National Labor Relations Board argued to the Court in its brief to the United

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[1] *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir. 1989); *NLRB v. BUFCO Corp.*, ___F.2d___, 1990 WL 37251 (7th Cir. 1990).

States Supreme Court in *NLRB v. Local Union No. 103, Int'l Assoc. of Bridge, Structural and Ornamental Iron Workers* (Higdon), No. 76-719 (October Term, 1976) that " . . . the language of section 8(f) and its relationship to other provisions of the Act reflect that *section 8(f) was not intended to relieve unions that are parties to pre-hire agreements from the obligation to achieve majority support before they can require an employer to honor such an agreement by means of section 8(a)(5). . . .* " [*Id.* at 23-24](emphasis added). While there were other arguable interpretations of Section 8(f) and its legislative history, the United States Supreme Court announced that the Board's position was essentially correct, and stated: "the pre-hire agreement is voidable and does not have the same stature as a collective bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer." 434 U.S. at 341. The Court affirmed the Board's decision that picketing to enforce a pre-hire agreement violated NLRA section 8(b)(7)(C) [29 U.S.C. section 158(b)(7)(C)], as "acceptable" and a "defensible construction of the statute." *Id.* at 341, 350. It is not "acceptable" for the Board to ignore the fact that the Supreme Court in *Higdon* upheld the Board based upon a review of the legislative history of section 8(f), and was not merely reiterating the Board's philosophy.

The Supreme Court embraced this logic and statutory interpretation in the context of a trust fund lawsuit under section 301 of the National Labor Relations Act [29 U.S.C. § 185] in the case of *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983). In *McNeff*, as in this case, the union brought suit under section 301 of the Labor Management Relations Act to enforce a pre-hire agreement. The Court unanimously

affirmed that an employer has an *"undoubted right* to repudiate a pre-hire agreement before the union attains majority support in the relevant unit. . . . " 461 U.S. at 270 (emphasis added). *See also Id.* at 271 ("a section 8(f) pre-hire agreement is subject to repudiation until the union establishes majority status"), *and see Woelke and Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 664 (1981) ("[the employers], if they do not have a stable workforce among whom the union has secured a majority, may be free to repudiate the agreement at any project which the union has not demonstrated that it represents the majority of their employees"). By emphasizing that the Court's jurisdiction derived from section 301, the Court drew a "critical distinction" between the Board's obligation to decide unfair labor practice charges and the Court's obligation to construe the enforceability of collective bargaining agreements under section 301. The Court noted that only the former had been addressed in *Higdon.* The latter was settled in *McNeff. Id.* at 267, *and* at 267 n. 7. See also *Thurston Motor Lines, Inc. v. Jordank, Rand, Ltd.,* 460 U.S. 533, 535 (1983); *Hutto v. Davis,* 454 U.S. 370, 375 (1982) (per curiam). Thus, the meaning of section 8(f) and its legislative history became the finding of the Court.

Only four years after the Court's opinion in *McNeff,* in the case of *John R. Deklewa and Sons, Inc.,* 282 NLRB No. 184 (1987), the NLRB decided, for administrative convenience, to abandon this view of the legislative history. Less than two years after *Deklewa,* the NLRB has likewise abandoned the reasoning behind *Deklewa* in the case of *Laborers' Local Union No. 1184 (NVE Constructors, Inc.),*

296 NLRB No. 165 (1989).[2] Although it is raised in the context of a trust fund lawsuit under Section 301 of the Act, the Court of Appeals for the Ninth Circuit has overruled existing Circuit Court cases and applied the NLRB's view of section 8(f) instead of the Supreme Court's view.[3] The Court must preserve the balance of power between the executive, legislative and judicial branches of government, and remind the agency and Court of Appeals that due process of law includes the principles of *stare decisis*

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[2] As will be set forth later, the NLRB erred in its reasoning in support of the *Deklewa* decision. The first part of the *Deklewa* decision describes well the subsidiary rules and policies developed as a result of the Supreme Court's decision in *Higdon*. In *Deklewa*, the Board found it intellectually difficult to justify a presumption in favor of majority status from the mere passage of time or from the use of exclusive union hiring halls, trust fund benefits, or forced union membership. This lead to the result that all construction agreements which are not supported by card based or other independent pre-signing indications of majority status remain section 8(f) pre-hire agreements until and unless the union wins in an NLRB conducted election or is voluntarily recognized based upon independent evidence of majority status. However, this does not make pre-hire agreement non-voidable, it does not create temporary fictitious 9(a) relationships and it does not mean the Supreme Court's opinions in *Higdon* and *McNeff* can be ignored.

[3] A further reason not to apply *Deklewa* in the context of this section 301 suit is that the Board itself would not and could not apply its decision to the facts of this case. The Board held that *Deklewa* would apply only "to this case and to all pending cases in whatever stage." *Deklewa* at 1389. This case is not now, nor could it ever be, presented for adjudication to the Board. The Board could not accept an unfair labor practice charge under section 8(a)(5) because the six-month statute of limitations has run. NLRA section 10(b) [29 U.S.C. § 160(b)].

and the power of higher courts to mandate to lower courts the outcome of decisions based upon clear rules of precedent. Otherwise, the principle of jurisprudence becomes the mere political whim of the most recent judicial or administrative official to deal with the problem.

McNeff Was A Trust Fund Case In Which The Supreme Court Did Not Defer To Any Agency Ruling. Likewise, In Trust Fund Cases, A Federal Court Owes No Duty Of Deferral To The NLRB, Especially When The Board Rewrites The Act In The Name Of Administrative Convenience Instead Of Interpreting Congressional Intent.

The Court owes no deference to an agency which attempts to engage "in the unauthorized assumption . . . of major policy decisions properly made by Congress." *American Ship Building Company v. NLRB*, 380 U.S. 300, 318 (1965). It is the responsibility of the Court authoritatively to construe statutes, and to reject an agency interpretation which is contrary to congressional intent. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-844 (1984); *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). The agency is subject to even greater scrutiny when it abruptly departs from precedent. *NLRB v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO ("Higdon")*, 434 U.S. 335, 351 (1978); *Lovshin v. Department of the Navy*, 767 F.2d 826, 840 (D.C. Cir. 1985), *cert. denied.*, 106 S.Ct. 1523 (1986); *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1330 (11th Cir. 1983); *NRDC v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982); especially so precedent set by the Court.

Judge Kozinski, in his eloquent dissent to the decision of the Ninth Circuit *en banc*, excerpts from which follow, presented the issue directly.

> "It is emphatically, the province and duty of the judicial department, to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803). To MARBURY's ringing pronouncement the majority would add a codicil: "until and unless the agency charged with administering the law changes its mind." According to the majority, if a federal court relies on an agency's interpretation of a statute, the court's construction is binding only until the agency decides the statute means something else altogether. At that point the court, or a higher court, or a lower court, may – nay, must – follow the agency's new interpretation unless that interpretation is unreasonable. This, I respectfully suggest, results in a significant shift of authority from the judiciary to the executive branch. Whenever Congress charges an agency, board, commission or department with administering a statute – I would venture to guess that this includes a substantial majority of our most significant federal laws – the judges become the handmaidens of the agency, relegated to deciding not what the law is, but only whether the agency's construction of the law is reasonable.
>
> This is no small change. Courts and agencies are fundamentally different, both institutionally and functionally. Judicial decision making is hedged about with a variety of constitutional safeguards designed to protect it from manipulation by the political branches. In interpreting statutes, courts are bound to find and apply the meaning endowed them by Congress and the President. It is emphatically not the function of courts to read policy content into statutes, or to interpret them in a way that will

foster a particular political viewpoint. Administrative agencies, by contrast, are designed to bend with the political winds. The leadership and policy direction of executive departments change with every administration; members of so-called independent agencies are appointed with reference to their political affiliations. Agency officials are expected to rely on their views of public policy in carrying out their responsibilities.

Because judges must read a statute in the way that best reflects its meaning, courts are far slower than agencies in overruling their decisions. Once a circuit interprets a statute, only an en banc panel of the same court or the Supreme Court may adopt a different construction; only the Supreme Court may modify or reverse its own prior construction of a statute. By contrast, agencies can change their outlook as often and easily as a chameleon changes its color. A change of administration may prompt an executive department to alter its position on a particular piece of legislation overnight. As positions taken by a regulatory agency may hinge on a narrow majority, appointment of a single commissioner may drastically change the agency's approach to its organic statute.

This difference between the constraints on the judiciary and the broad freedom afforded agencies derives directly from the disparate functions they perform. When courts interpret a statute, they search for its true meaning – and there can never be more than one true meaning. To be sure, reasonable minds may differ as to what that meaning may be; occasionally it may be necessary to correct a judicial decision that misreads that meaning. But in performing their proper function, judges must listen for the voice of the legislature, not to the sound of their own heartbeats. Because courts are bound by the best

construction of the statute, they may alter their interpretation only in response to a powerful new insight as to the law's meaning, not because a different panel of judges prefers a different result.

Agencies, on the other hand, may turn on a dime: Their proper function is to fill in policy gaps pursuant to an explicit or implicit delegation of authority from Congress. See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974) ("[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress"). Where Congress has delegated such authority, the statute becomes a clear vessel which changes its tint as it is filled and refilled by various policy pigments. Because the agency administering the statute is not bound to a single formulation of statutory language, it may make changes without considering whether the new approach more accurately reflects the meaning of the statute.

Both types of decision making processes serve a vital function so long as each is confined to its own sphere. The majority goes astray in conflating the two. This error has the effect of displacing the courts' methodical, deliberate search for a law's meaning with the policy judgment of a politically responsive administrative agency. This is troubling both as a jurisprudential and as a practical matter.

Jurisprudentially, I am troubled by the majority's implicit holding that the meaning of a statute can change in an instant simply because an administrative agency has said so. Statutory meaning is not a matter of hopes or wishes; it is a fact. In settling on a particular interpretation

of a statute, the court is saying: "This is the meaning that was actually conferred upon this statute by Congress." In reaching that conclusion, the court looks first at the statute's language and structure, but may also rely on the statute's legislative history and the view of the agency charged with its enforcement. A change in the agency's view alters this calculus and may motivate a reviewing court to reconsider the soundness of its prior interpretation. But a change in an agency's position cannot automatically alter the meaning Congress gave the statute years earlier.

By reaching the contrary conclusion, the court is, in effect, holding that statutes have no fixed meaning, that in passing laws Congress approves a range of possible interpretations, each as good as the next. While this approach fits in neatly with the popular mythology, conceived and nurtured in legal academies, that words are incapable of conveying precise concepts, it "undermines the basic principle that language provides a meaningful constraint on public and private conduct." *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988). Needless to say, I disagree with this approach which, in my view, represents a serious abdication of judicial responsibility.

[FN 2] A reassuring inconsistency suggests the majority is not entirely comfortable with its own prescription: Specifically, the majority goes to great pains to demonstrate that Deklewa's interpretation of section 8(f) is not merely permissible, but preferable. Majority opinion at 1132-34. Thus, the court observes that "Deklewa's literal reading of the second proviso [of section 8(f)] is a more likely reading of congressional intent than that given by R.J. Smith," *Id.* at 1132 (emphasis added), and concludes that "[t]he Board's prior rule, allowing repudiation

of such agreements in addition to these explicit statutory protections, has proved unwise." *Id.* at 1133. Such ruminations have no legitimate place within the analytical framework adopted by the majority: If we are bound to follow the Board, we must approve even a poor interpretation of the statute, so long as it falls within the range of permissible meanings. Future courts might be wise to note the majority's concern with what "best serves the interests of employers and employees," id. at 1129, and then do as we do, not as we say.

And this brings me to the practical problems wrought by today's decision. The en banc court's ruling – should it become the law of the land – will make hundreds, perhaps thousands, of laws that have been conclusively interpreted by the courts subject to uncertainty whenever there is a shift in the political winds. A brief survey of recent cases in which the Supreme Court has relied on an agency's interpretation suggests the scope of the problem. (citations omitted) . . . Our circuit has deferred to agency construction of statutes in an equally wide range of cases (citations omitted) . . .

This handful of examples barely hints at the scope of the problem created by today's decision. If deference means blind adherence to the agency's construction as it meanders through the range of non-irrational meanings, federal judges should plan to take a long holiday and observe from afar as the body of federal law develops without their further meaningful input. A change of this magnitude in the relationship between the judicial and executive branches of government should come from the Supreme Court, if it comes at all.

The Board Has Not Construed Section 8(f), It Has Rewritten It

Section 9(a) of the National Labor Relations Act is the equivalent of a Bill of Rights for collective bargaining. It applies, by its terms, after employees have, "by a majority of the employees in a unit appropriate for such purposes" chosen a representative to bargain for them collectively. Section(s) 8(a)(5) and 8(b)(3) of the Act guarantee the freedom to make that choice by identifying coercive or bad faith conduct by both union and employer.

Contracts executed pursuant to section 8(f) of the Act are different from section 9(a) collective bargaining agreements. *Retail Clerk's Int'l Assn. v. Lion Dry Goods*, 369 U.S. 17, 27, 35 (1962). In enacting section 8(f) of the Act, Congress fashioned a limited exception to the principle of employee free choice enforced by sections 8(a) and (b) of the Act. Thus, section(s) 8(a)(2) and (5) forbid an employer from entering into a union agreement without prior evidence of employee support. Section 8(f) validates this otherwise unfair labor practice by permitting an agreement to be reached on a pre-hire basis, *e.g.* before any evidence of union support. In so doing, the Congress clearly indicated that such an agreement must be "purely voluntary" and free of coercion. Unless confirmed by evidence of majority support, pre-*Deklewa* section 8(f) contracts were considered purely executory and repudiable at any time.

In implementing the Congressional mandate represented by section 8(f), the Board considered that the

shifting nature of the construction workforce made elections or a showing of cards, the traditional means recognized in the Act for a demonstration of majority support, impractical. Accordingly, the Board fashioned two additional devices to make employee choice possible. Thus, the doctrines of conversion and merger serve to provide the equivalent of an election by allowing proof that an employer's workforce has the permanent and stable characteristics of a non-construction employer; or if the underlying contract is executed through a multi-employer group, that a overall majority exists in favor of the union, and therefore, the 8(f) contract is considered merged into the larger whole.

Repudiation, merger and conversion were, until *Deklewa*, entrenched and unchallenged Board law. The only controversy was when a merger or conversion occurred. The concepts required an employer to "chart" its workforce, job-by-job and look for a statistically significant portion of employees working on more than one jobsite successively. The trial court in *Mesa Verde* was able to perform this task quite easily. See *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 598 F. Supp. 1092, 1097-1099 (N.D. Cal. 1984). Not only are the "rules" of then existing Board law on merger and conversion set forth clearly in the first pages of the *Deklewa* decision, but they were widely published and understood by the labor law community. Job-site by jobsite employers could repudiate for future jobs only, unless they merged their workforce into the multi-employer group's workforce. *See, e.g., Baton Rouge Building Trades Council v. E.C. Schaffer*, 657 F.2d 806 (5th Cir. 1981); Thierman & Pattison, *Lowest Responsible Bidder*,

(1985). These rules have been adopted by the Court, under the mandate it itself laid out in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as permissible constructions of the Act.

The *Deklewa* rule abandons the doctrines of repudiation, merger and conversion. In their stead, the Board has altered the mechanisms by which elections may be sought under the Act, by concluding that the contract bar rule does not apply, and therefore employers may call for decertification elections at any time without showing proof of employee dissatisfaction with the union. This is a useless slight of hand, since the union is by definition a minority representative and existing Board law before *Deklewa* allowed an employer to file a petition for an election anytime anyway. See *Albuquerque Insulation Contractor*, 256 NLRB No. 15 (1981)[4]

In *Deklewa*, the Board abandoned the statutory construction it had urged before the Supreme Court in *Higdon*, and held that, in all respects, 8(f) agreements are fully enforceable by Section(s) 8(a)(5) and 8(b)(3), as are traditional collective bargaining agreements under the Act.[5] The NLRB also implied in *Deklewa*, that unions

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[4] The pre-*Deklewa* reason for an employer to file for an election was that then the NLRB would make the initial determination that the contract was a pre-hire agreement and no conversion or merger had occurred. The Union could always file an unfair labor practice charge if it believed the contract was not a pre-hire agreement.

[5] This position is somewhat disingenuous as to unions who decide to "disclaim" and then renounce the section 8(f)

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could not picket to obtain an employer's signature to a pre-hire agreement, since pre-hire agreements had to be voluntarily entered into, although in a more recent decision, the Board has retraced its steps on that point, limiting issuance of complaint under section 8(b)(7), in contradictory fashion, to situations where there are no unit employees or the picketing for a pre-hire agreement has exceeded 30 days. See *NVE Constructors, Inc., supra.*

The Board's pronouncement in *Deklewa*, that section 8(f) contracts are no longer (or were never) repudiable, and that henceforth pre-hire agreements will be enforced during their term under section(s) 8(a)(5) and 8(b)(3) without regard to whether the union actually achieves status under section 9(a) as the majority representative contradicts the plain language of the statute. Section 8(f) provides that "it shall not be an unfair labor practice under subsections (a) and (b)" for a construction industry employer to enter into an agreement with a union whose majority status has "not been established under the provisions of section 9 of this Act *prior to the making of such agreement. . . .* " *See also* S. Rep. No. 187 at 55, 1 Leg. Hist. 451; H. Rep. 741 at 50, 1 Leg. Hist. 808 (emphasis added). (Section 8(f) "[m]akes clear that it is not an unfair labor practice for an employer . . . to *enter into* [pre-hire agreements] . . . without the union's majority status having

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agreement. The NLRB still believes the relationship between a union and the employees to be such a critical element of the collective bargaining relationship that the union that does not "represent" employees can repudiate. Moreover, 8(f) agreements, even after *Deklewa*, are not binding on employers without employees. See e.g., *Stack Electric*, 290 NLRB No. 73 (1988).

been established. . . . "). Nothing in section 8(f) intended pre-hire agreements to be enforced in the same manner as collective bargaining agreements under section 9(a).[6]

Just a few years ago, the NLRB believed that Congress wanted pre-hire agreements to be purely voluntary and "at will" for the duration of a jobsite or until the union became the majority representative of employees. The NLRB and the courts were keenly aware of the power of construction unions to engage in top down organizing. Congress having legitimized the industry practice of union only projects through the construction industry proviso to section 8(e), the NLRB developed the law of pre-hire abrogration to prevent contracts of adhesion and to avoid trying issues of fraudulent or coercive inducement. *See Woelke and Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1981). In its brief to the Court in *Higdon*, the

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[6] A more plausible holding, consistent with the decisions of the Court and the legislative history, would affirm Congress' intent that all contracts in the construction industry are considered pre-hire and "at will". Let the union that seeks the benefit of a section 9(a) relationship come forward to file for an election. The Board's pre-*Deklewa* position is similar to the common law concepts of capacity to contract. A minor, who lacks the legal capacity to contract, can void any contract, but can continue to receive goods and services as long as the minor pays for goods and services already received. In the pre-hire context, the union lacks the capacity to enter into a binding contract, but the employer must honor the contract for the job or project, and must continue trust fund contributions until notice is given to prevent third party reliance. *Deklewa* has created a fictitious capacity in a minority union to enter into binding contracts not envisioned in the Act, permitting them an unequal bargaining position in establishing a permanent relationship with an employer.

General Counsel emphatically affirmed that the statute, as written, compelled the Board's result: section 8(f) did not create 9(a) rights.

> [T]he issue in [*Higdon* is] whether Section 8(f) itself establishes that a union signatory to a pre-hire agreement shall be deemed by operation of law to be the recognized bargaining representative of all employees subsequently hired *until the agreement expires or the union is ousted by an employer – initiated board election.* As we demonstrate below, *neither the language of section 8(f) nor its legislative history supports that conclusion,* or in any way suggests that Congress intended so sweeping a qualification of the Act's major premise that employees shall be represented by bargaining agents of their own choosing. [Br. of the Board in *Higdon,* pp. 18-19.]
>
> *Nothing in the language of Section 8(f),* however, suggests that it was designed to confer upon a union that is a party to a pre-hire agreement the kind of representative status that *would support a Section 8(a)(5) bargaining order against an employer* who refused to bargain with it. . . . *Indeed the language and structure of the Act suggests precisely the opposite.*
>
> Significantly, Congress in 1959 did not, in section 8(f) or elsewhere modify section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a)*" [emphasis in original]. [*Id.* at 22-23.]
>
> In short the language of section 8(f) and its relationship to other provisions of the Act reflect that *section 8(f) was not intended to relive unions that are parties to pre-hire agreements from the obligation to achieve majority support before they can require an employer to honor such an agreement*

> *by means of section 8(a)(5). . . . [Id.* at 23-24] (emphasis added).

For many years, union advocates have urged Congress to alter the special character of 8(f) contracts to make them instantly enforceable, upon execution. In *Deklewa*, as affirmed in *Mesa Verde*, the Board did what the Congress would not. Indeed, just this point was made to the Court by the General Counsel in *Higdon:*

> The legislative history of Section 8(f)) confirms that Congress did not intend its authorization of prehire agreements in the construction industry to confer automatic representative status or to obviate the union's obligation to acquire majority support. Congress rejected a proposal that would have permitted the Board to certify a union signing a prehire agreement as the employees' representative without an election or other proof of majority support merely upon a showing of a history of bargaining between the union and the employer. [*Id.*] [See Section 702 of H.R. 8400, 86th Cong., 1st Sess., 1 Leg. Hist. 678-79 (1959); 105 Cong. Rec. 6431, 15, 541-42, 17, 899, 18, 135 (1959)].

The effort continues in Congress to this day. See e.g., H.R. 281, 100th Cong., 1st Sess. That, it is submitted, is where it belongs.

Only An En Banc Panel Of The Court Should Have The Ability To Alter Established Circuit Precedent In Order To Ensure The Stability Of Our Laws And Reduce Unjustified Appeals, And The NLRB Is Not Entitled To Any Special Exemption.

The Ninth Circuit has long held that a decision of a three judge panel may only be reversed en banc. "[U]nder the long standing practice of this court, a panel may not overrule a prior decision." *Charleston v. United States*, 444

F.2d 504 at n. 3 (9th Cir. 1961) (citing 9th Cir. Rule 23, 28 U.S.C.). A majority of other circuits have followed the same practice. *See* En Banc Proceedings, 37 ALR 274, §5. (Second, Third, Fourth, Fifth, and District of Columbia Circuits.)

The en banc panel has now unwisely departed from this principle, known in the Circuit as the *Royal Development* rule. (*Royal Development Co. v. NLRB*, 703 F.2d 363, 369 (9th Cir. 1983)), *citing NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135 (5th Cir. 1973), *rev'd*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). This departure is particularly unsound with regard to Circuit decisions adopting or rejecting Board law in the typical case because the Circuit court functions as a court of first resort for the purposes of judicial review. In actions arising, as does this one, under section 301, the trial court exercises its original jurisdiction in interpretation of the Act in the enforcement of collective bargaining agreements, subject to the consent of the Circuit. As the Ninth Circuit observed in *Royal*, this jurisdictional mandate is consistent with sound

> [p]olicy reasons for refusing to adopt a Board decision that conflicts with our earlier precedent absent an en banc convening of the court. In effect, the Board would be free to "reverse" circuit decisions whenever its membership changed, thus relegating the courts of appeal to a minor supervisory role over the Board. This, we believe, would be inconsistent with our legislative process.
>
> *Id.*, 703 F.2d at 368.

The fundamental error in *Mesa Verde's* adoption of *Deklewa* is that it is premised on a false belief that the

Board may alter the rights created by the Act in discharging its duty to implement and interpret. The historical charge of appellate courts, identified so clearly by Judge Kozinski, is to isolate and correct such errors. Facilitating their commission by permitting a variation of the en banc rules invites a compromise of the essential guarantee of justice which the Court exists to preserve.

CONCLUSION

For the above stated reasons this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUBCHAPTER IV – LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer –

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents –

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as

the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

§ 159 REPRESENTATIVES AND ELECTION

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

§ 160 PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the

United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-b, 723-C).